98-10002

Supreme Court, U.S.
FILED
JUN 5 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

No. _____

GARY GRAHAM, now known as
SHAKA SANKOFA,

Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Gary Graham, now known as Shaka Sankofa, respectfully requests that the Court permit him to proceed *in forma pauperis* on his Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, to which this motion is attached.

Mr. Sankofa is now and has always been eligible to proceed in the federal courts as a pauper. In the most recent proceedings in the United States Court of Appeals for the Fifth Circuit and in the United States District Court for the Southern District of Texas, counsel were

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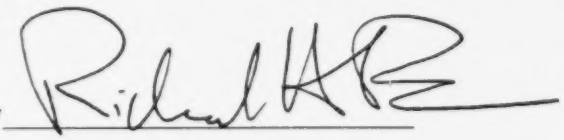
appointed for Mr. Sankofa in both courts pursuant to 21 U.S.C. § 848(q)(4)(B) (requiring appointment of counsel in capital federal habeas corpus proceedings for a person "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services").

WHEREFORE, petitioner respectfully requests that the Court grant leave for him to proceed *in forma pauperis*.

Respectfully submitted,

RICHARD H. BURR*
1630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

JACK B. ZIMMERMANN
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

By 

Counsel for Petitioner

*Counsel of Record

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1630 Castle Court, Ste. A
Houston, Texas 77006
(713) 523-2299
(713) 523-3833 (fax)

JACK B. ZIMMERMANN
770 South Post Oak Lane, Ste. 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

***Counsel of Record**

(9)

CAPITAL CASE

QUESTIONS PRESENTED

*In a capital case where a successive federal habeas petition was filed making a substantial showing that ineffective assistance of trial counsel resulted in the conviction and condemnation of a man who is actually innocent, where the case was pending in the United States Court of Appeals at the time of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and where, **after** AEDPA was enacted, the Court of Appeals dismissed it* sua sponte, ***without prejudice**, for further exhaustion of state remedies:*

1. Did the Court of Appeals in 1999 err by holding that the refiling of the pre-AEDPA petition after re-exhaustion of state remedies constituted a new habeas application to which AEDPA applied, and by disregarding the teaching of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), by finding in that opinion "no indication that the . . . [refiled] application should be treated as a continuation of the first so as to preclude the application of AEDPA" (168 F.3d at 777)?

2. Did the Court of Appeals err by holding that Congress intended AEDPA's amendments to 28 U.S.C. § 2244(b) to apply to cases in which a habeas petition was filed before AEDPA and refiled (following exhaustion) after AEDPA, and by disregarding (a) the requirement of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that Congress express such an intent unambiguously, and (b) conflicting decisions by the Third, Sixth, and D.C. Circuits that Congress did not express such an intent?

3. Did the Court of Appeals err by holding that the application of AEDPA to bar the refiling of a pre-AEDPA successive petition which was entitled to be heard on the merits when it

was filed originally (since it made a showing of actual innocence and ineffective assistance) was not impermissibly retroactive because retroactivity requires a showing of "reasonable detrimental reliance," when such a holding conflicts with (a) the standard for retroactivity established by *Landgraf*'s "default rule" analysis (*viz.*, the attachment of new legal consequences to pre-enactment events), (b) the holdings of the Third, Sixth, and D.C. Circuits that *Landgraf* controls in such circumstances; and (c) the teaching of *Lonchar v. Thomas*, 517 U.S. 314 (1996), that the respective responsibilities of habeas petitioners and courts are measured by the body of clearly established exhaustion and successive-petition rules and are not to be constructed *ad hoc*?

4. Did the Court of Appeals err by refusing to recall its 1996 mandate in the belief that *Calderon v. Thompson*, 523 U.S. 538 (1998), categorically forbids the post-AEDPA recall of any pre-AEDPA habeas mandate at a petitioner's instance, even to prevent the retroactive frustration of the mandate's purpose and to prevent a miscarriage of justice?

5. Did the Court of Appeals' refusal to recall its mandate under these circumstances constitute a denial of due process because it deprives petitioner of any remedy for a fatal miscarriage of justice, solely through delays in the adjudication of his valid federal habeas corpus claims that were not due to any untimeliness or fault on his part?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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2. Even if Mr. Sankofa's refiling of his 1993 petition in 1998 amounted to the filing of a post-AEDPA petition, the Fifth Circuit's determination that Congress intended the new § 2244(b) provisions to apply to such a petition (a) disregards the requirement that Congress express such an intent unambiguously, and (b) conflicts with the decisions of the Third, Sixth, and D.C. Circuits on this same important matter. 22

3. (A) The Fifth Circuit's conclusion that applying AEDPA's § 2244(b) has no retroactive effect in the absence of "reasonable detrimental reliance" conflicts with *Landgraf*'s quite different test for retroactive effects and with decisions of the Third, Sixth, and D.C. Circuits finding retroactive effects under *Landgraf* in cases like Mr. Sankofa's without requiring "detrimental reliance." 25

(B) Even if "reasonable detrimental reliance" were required, the Fifth Circuit's conclusion that Mr. Sankofa has not shown such reliance departs so far from settled principles of pre-AEDPA law as to call for the exercise of this Court's supervisory powers under *Lonchar v. Thomas*, 517 U.S. 314 (1996). 25

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gary Graham, now known as Shaka Sankofa, respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on February 25, 1999. In support of his request, Mr. Sankofa sets forth the following:

CITATION TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999), reproduced in Appendix 1 hereto. The opinion of the United States District Court for the Southern District of Texas which was appealed to the Fifth Circuit is *Graham v. Johnson*, ___ F.Supp.2d ___, 1999 WL 216101 (S.D.Tex.), in Appendix 2.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Fifth Circuit affirming the judgment of the District court was entered on February 25, 1999 and revised February 26, 1999. A timely suggestion for rehearing en banc was filed, was treated by the Fifth Circuit as a petition for rehearing, and was denied March 23, 1999. *See* Appendix 3. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are set out in Appendix 4.

STATEMENT OF THE CASE

This is, at its core, a case about a person who was convicted of a murder in which he had no part and was sentenced to death because his lawyer failed to bring out the facts showing mistaken identity. These facts emerged after years, and when he asserted his lawyer's

ineffectiveness for the second time, in a 1993 federal habeas petition, the district court assumed that he was entitled to pursue his claim through a successive petition, inasmuch as he was probably innocent But it denied relief on the merits without an evidentiary hearing; and on appeal the Fifth Circuit, finding the factual record insufficiently developed and believing that a state evidentiary forum might have become available to hear the case, *sua sponte* remanded and ordered a dismissal without prejudice for further exhaustion. This ruling was made four months after AEDPA was enacted. Following fruitless exhaustion, the condemned man returned to the federal courts, and this time the Fifth Circuit ruled that the successive-petition provisions of AEDPA applied and barred relief without regard to innocence. This petition challenges the ruling that a person who was entitled to a hearing under pre-AEDPA law to demonstrate his lawyer's ineffectiveness and his own actual innocence has been retroactively deprived of that right by AEDPA. These are the details:

A. Procedural History

Shaka Sankofa, then Gary Graham, was convicted of capital murder and sentenced to death on May 13, 1981, in Harris County, Texas. His conviction and sentence were affirmed, and his first state and federal habeas applications were ultimately unsuccessful. *See Graham v. Johnson*, 168 F.3d 762, 764-767 (5th Cir. 1999) (Appendix 1) (recounting procedural history).

Mr. Sankofa commenced his second state habeas proceeding on April 20, 1993. His primary claim was that he is innocent and that his trial lawyer's ineffective assistance in failing to investigate his case led to his mistaken conviction. He also claimed that, because he was innocent, his execution would violate the Eighth and Fourteenth Amendments. In support, he showed that his lawyer inexplicably failed to interview five known and available crime-scene

witnesses, each of whom would have exonerated Mr. Sankofa if counsel had spoken with them. He demonstrated that a reasonable jury presented with these witnesses' testimony could not have found him guilty beyond a reasonable doubt because the only evidence connecting him to the crime – the testimony of a single crime-scene witness who, after an extremely suggestive police identification procedure, identified Mr. Sankofa as the assailant – could not have overcome the substantial doubt of his guilt.

As the state habeas court was denying relief on April 26, 1993, Mr. Sankofa finally gained access to the prosecutor's file.[1] A police report in the file led him to (a) two more crime-scene witnesses who exonerated him but who had not testified at trial (bringing the total to seven), (b) additional evidence corroborating the accounts of the exculpatory crime-scene witnesses, and (c) lab reports, not presented at trial, which excluded his gun as the murder weapon.[2] The police report had not been seen by anyone representing Mr. Sankofa since his trial counsel saw it before trial.

Mr. Sankofa filed his second federal habeas petition on April 28, 1993, but dismissed it voluntarily the same day following the issuance of a thirty-day reprieve by then-Governor Ann

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[1]The Court of Criminal Appeals adopted the trial court's recommendation to deny the habeas petition one day later, on April 27, 1993, *Ex parte Graham*, 853 S.W.2d 564 (Tex.Crim.App. 1993), notwithstanding Mr. Sankofa's plea to stay the case because of the newly-available prosecution file.

[2]After this new evidence was discovered, Mr. Sankofa filed in the Texas Court of Criminal Appeals a Motion to Continue the Stay of Execution and for Remand for Evidentiary Hearing on Claim of Ineffective Assistance of Counsel, in which he set forth the newly discovered evidence supporting the claims made in his second (April 20, 1993) state habeas petition. The Court of Criminal Appeals denied the motion without prejudice to presenting a new state habeas application in the trial court. *Ex parte Graham*, 853 S.W.2d 565, 570-571 (Tex.Crim.App. 1993).

Richards. Following investigation of the evidence revealed for the first time by the disclosure of the prosecutor's file on April 26, 1993, Mr. Sankofa refiled his second federal habeas petition on July 22, 1993, without returning to the state courts to present the new facts found through the prosecutor's file.[3] He did so believing that it was appropriate to take the issues expeditiously to federal court – a position with which the State agreed by failing to invoke nonexhaustion in its answer, as it was legally required to do if it meant to invoke exhaustion at all, *see* Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, and *Granberry v. Greer*, 481 U.S. 129, 134 & n.5 (1987), and by **affirmatively waiving exhaustion** as permitted under *Granberry*. The District court denied relief on the merits without any evidentiary hearing on August 13, 1993. *Graham v. Collins*, 829 F.Supp. 204 (S.D.Tex. 1993).

Three years later, following oral argument on appeal, the Fifth Circuit ruled *sua sponte* – although no exhaustion issue had ever been raised by the State or by the court, or briefed by the parties – that Mr. Sankofa's case needed further state-court review. The Fifth Circuit therefore ordered that Mr. Sankofa's petition be dismissed, **specifying that its dismissal was "without prejudice."** *Graham v. Johnson*, 94 F.3d 958, 970-971 (5th Cir. 1996).[4] Central to the Fifth Circuit's decision to reject the conclusion of both parties that additional state-court proceedings

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[3]The Fifth Circuit refers to the petition filed on July 22, 1993, as the "third" federal habeas petition filed by Mr. Graham. 168 F.3d at 770. Mr. Sankofa has always referred to it as his "second" federal petition, because he dismissed what was numerically his second petition voluntarily on the same day it was filed, April 28, 1993, in order to investigate the additional evidence in support of his claims that the discovery of the prosecutor's file on April 26 permitted. The petition filed July 22, 1993, was only the second petition ruled on by the District court. Accordingly, it properly is his "second" federal habeas petition.

[4]Because of its relevance to the issues before the Court, Mr. Sankofa has included this opinion as Appendix 5.

were unnecessary was the fact that the "federal district court denied the petition without an evidentiary hearing" on "the many ... unresolved" factual issues in the case – despite Mr. Sankofa's request for an evidentiary hearing, *see* 94 F.3d at 965 – thus leaving the appellate court in doubt whether it could "review ... the underlying issues on a fully informed basis." *Id* at 971.

However, the Texas Court of Criminal Appeals summarily refused to permit the filing of another state habeas application and dismissed Mr. Sankofa's application as an abuse of the writ. *Ex parte Graham*, No. 17,568-05 (November 18, 1998) (Appendix 6 hereto). So, on December 18, 1998, Mr. Sankofa returned to the federal district court with a habeas petition setting out the same claims of ineffective assistance of counsel and actual innocence, on the basis of the same material facts, that were contained in the 1993 petition which the Fifth Circuit had ordered dismissed without prejudice.[5] Mr. Sankofa argued that AEDPA's amendments to § 2244(b) of the federal habeas statute (barring successive same-claim petitions) did not govern this petition because it was a continuation of the federal habeas petition he had filed before AEDPA in 1993, and because if AEDPA were applied to his case, it would be impermissibly retroactive, attaching new, preclusive effects to pre-AEDPA events occurring at the time of his initial 1988 petition and at the time of his second, 1993 petition. The District court held that AEDPA's amendments to § 2244(b) did apply, and accordingly dismissed Mr. Sankofa's petition on January 7, 1999.

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[5]The only allegations that were added to the 1998 petition as compared with the 1993 petition concerned (a) possible suspects other than Mr. Sankofa or other motives for the killing of the deceased, which were identified or alluded to in the police report that Mr. Sankofa finally obtained in 1993, and (b) the fact that people in the neighborhood who thought they saw the suspect there after the killing had never seen Mr. Sankofa in the neighborhood. These additional allegations were corroborative of the primary facts showing that Mr. Sankofa was innocent, *see* Statement of the Case, Section B, Material Facts, *infra*, and in no way changed the claims made in the 1993 petition.

Graham v. Johnson, ___ F.Supp.2d ___, 1999 WL 216101 (S.D.Tex.) (Appendix 2). The Fifth Circuit affirmed the district court's decision, denied Mr. Sankofa's request to file a successive petition under 28 U.S.C. § 2244(b)(3), and denied Mr. Sankofa's request to recall the court's own 1996 mandate disposing of his 1993 petition. *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) (Appendix 1). These are the decisions that Mr. Sankofa now respectfully asks this Court to review.

B. Material Facts

At about 9:30 p.m. on May 13, 1981, Bobby Grant Lambert purchased $20 worth of items at a Safeway grocery store in Houston, Texas, receiving change from a $100 bill. As Mr. Lambert, a white man, walked across the parking lot to his car, a young black man approached him from behind. After a brief confrontation which appeared to some witnesses to involve an attempt to rob Mr. Lambert, the black man shot Mr. Lambert and fled. Mr. Lambert had sixty $100 bills on his person; none was taken. The $70-plus change from Mr. Lambert's purchase was never found. At least eight people saw the shooting and/or saw the gunman as he fled from the scene.

At trial, the only evidence connecting Mr. Sankofa to the crime was the testimony of one eyewitness, Bernadine Skillern, who saw the killing at a distance of 30 to 40 feet from her car in the dimly lit parking lot. After a suggestive identification procedure (described at page [9] below), Ms. Skillern picked Mr. Sankofa out of a lineup. Mr. Sankofa, who was 17 years old at the time and lived nowhere near the Safeway store, was not a suspect until he was arrested a week after the Lambert killing for other robberies and assaults occurring in the intervening week, in different parts of Houston.

The facts in support of Mr. Sankofa's claims of ineffective assistance of counsel and innocence, which have been set forth in his habeas petitions since 1993, bear a remarkable resemblance to those in *Schlup v. Delo*, 513 U.S. 298 (1995), where a strong showing of probable mistaken identity began to emerge several years after a trial marked by defense counsel's failure to interview numerous eyewitnesses. As alleged in Mr. Sankofa's 1993 petition and its 1998 reprise, Mr. Sankofa's court-appointed lawyer, Ron Mock, undertook no investigation of Mr. Sankofa's consistent assertions of innocence, because he believed Mr. Sankofa was guilty. This belief was not based on any admission or other information he got from Mr. Sankofa concerning the murder, nor on any evidence connecting Mr. Sankofa to the murder, but solely on Mr. Sankofa's confessions that he had committed a number of unrelated robberies and assaults during a period shortly after the murder of Mr. Lambert. Having thus convinced himself of his client's guilt, Mr. Mock failed to interview or undertake any investigation of the witnesses at the scene of the Lambert murder, many of whom saw the assailant before and after Mr. Lambert's shooting – all but two of whom were mentioned in the police report to which Mr. Mock acknowledged he was given access prior to trial – and none of whom, other than Ms. Skillern, identified Mr. Sankofa. In addition, Mr. Mock failed to present to the jury substantial evidence, known to him, that Ms. Skillern's identification was the product of a suggestive identification process rather than her observations at the crime scene, and that the fatal bullet was not fired by a weapon associated with Mr. Sankofa.

Capsulized, the evidence Mr. Mock failed to present to the jury, and about which the jurors were entirely ignorant when they convicted Mr. Sankofa, was the following:

1. Mr. Sankofa was arrested with a .22 caliber pistol a week after the murder. Mr.

Lambert was killed with a .22 caliber pistol. The police firearms examiner determined that Mr. Sankofa's weapon **could not have fired the fatal bullet**. No other weapon was ever connected to Mr. Sankofa.

2. Another suspect in the Lambert murder had access to a .22 caliber pistol that was never found. The suspect's brother had used this pistol to commit another murder very close in time to the murder of Mr. Lambert. After comparing the bullet from that murder victim to the bullet that killed Mr. Lambert, the police firearms examiner concluded that "it is possible the bullets came from the same gun."

3. **Eight** crime-scene witnesses have been identified who saw the assailant the night of Mr. Lambert's murder. **Only one of them**, Bernadine Skillern, has ever identified Mr. Sankofa as the assailant. And, as the State conceded in its most recent brief in the Fifth Circuit, Ms. Skillern only had a frontal view of the assailant's face for two or three seconds, at night, from a distance of 30 to 40 feet. **None of the other witnesses** – Ronald Hubbard, Sherian Etuk, Leodis Wilkerson, Wilma Amos, Daniel Grady, Malcolm Stephens, and Lorna Stephens, some of whom had much better views of the assailant – **identified Mr. Sankofa** in a photo array, a live line-up, or in any other manner.

4. None of the crime-scene witnesses had ever seen Mr. Sankofa before in their lives. All are strangers to him to this day. They are all **neutral witnesses**, with no connection to Mr. Sankofa. Six of these witnesses were interviewed by the police within the first few days after the murder, and they are discussed in the police report.[6]

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[6]The State has consistently attacked the credibility of Ms. Etuk and Mr. Hubbard, among others. No judge has ever heard these witnesses testify or observed their demeanor. This is why

5. Bernadine Skillern assisted in the drawing of a composite of the assailant. Three other crime-scene witnesses – Ronald Hubbard, Sherian Etuk, and Leodis Wilkerson – remarked that the composite looked like the man they saw that night. Comparison of the composite and the booking photograph of Mr. Sankofa, Appendix 7, reveals that **Mr. Sankofa does not look like the person in the composite**. **The person in the composite has a noticeably thinner face than Mr. Sankofa, and markedly different eyebrows, nose, and lips**.

6. Bernadine Skillern described the assailant's distinguishing features as "no facial hair" and a "short compact afro." She was shown two photo arrays, each with five photographs. Mr. Sankofa appeared only in the second array. Of the ten photos, **only Mr. Sankofa had both of the distinguishing features of the assailant**. Among the ten photos, which were mug shots, **only Mr. Sankofa's photo was altered by the police, to black out the date of the arrest**.

7. Despite this highly suggestive presentation, calculated to single out Mr. Sankofa's photo, Ms. Skillern told the officer that "the photo of Gary Gram [sic] looked like the suspect she saw on the night of the offense **except the complexion of the suspect she saw was darker and his face was thinner**. She said she could not say that the man in the photo was the suspect from the photo." Petition for Writ of Habeas Corpus, at Appendix 17 (at 33) (quoting from the police report) (emphasis supplied), filed in the District court on December 18, 1998. Ms. Skillern's initial refusal to identify Mr. Sankofa as the person she saw kill Mr. Lambert was consistent with her composite of the suspect, a composite that other crime-scene witnesses agreed was accurate. The jury did not know that Ms. Skillern had declined to make a positive identification of Mr.

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it is essential that a hearing be held to permit an impartial judge to determine credibility.

Sankofa on the basis of the photo array because his face was not thin as she remembered, and as the composite showed the assailant's face to be. Trial counsel, Mr. Mock, did not even challenge her misleading testimony to the jury that she **had** identified Mr. Sankofa from the photo array – leaving the jury to conclude that she had made **two** positive identifications.

8. The day after she saw Mr. Sankofa in a photo array, Ms. Skillern saw Mr. Sankofa again in a live lineup. **He was the only person who had been in both a photo array and the lineup.** Not surprisingly, she picked out Mr. Sankofa. She candidly admitted to the police that she had seen him in the photo array the night before.

9. Ronald Hubbard viewed the same live lineup with Bernadine Skillern and **did not see in the lineup the person he recalled as Mr. Lambert's assailant**.[7]

10. Of the six living crime-scene witnesses other than Ms. Skillern,[8] **all describe the assailant as shorter than Bobby Lambert, who was 5'6". Mr. Sankofa was 5'9"**.[9]

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[7]The State has consistently asserted that Mr. Hubbard told the police after the lineup that "he did not see the shooter's face." Brief of Appellee (in the most recent 5th Circuit appeal), at 41. In fact, although Mr. Hubbard did not see the shooter's face at the moment of the shooting, he told the police in his initial interview that he had seen the suspect before and after the shooting and, for that reason, was able to provide a detailed description of the shooter, including his age, height, weight, hair style, facial hair, and clothes. He also agreed to do a composite drawing, although the police report does not indicate whether he ever did. Nevertheless, he was able to tell the police that the drawing which Ms. Skillern helped make was "a fair likeness" of the assailant he saw that night. Petition for Writ of Habeas Corpus (filed December 18, 1998), Appendix 17, at 24.

[8]Daniel Grady died after the trial and before he could be interviewed by habeas counsel for Mr. Sankofa.

[9]In addition to the foregoing facts, Mr. Sankofa also claimed, beginning with his first state and federal petitions in 1988, that Mr. Mock was ineffective for failing to investigate and adduce alibi witnesses. A hearing was held in state court, during which two of the five alibi witnesses, members of Mr. Sankofa's family, testified. The state judge found these witnesses not

Thus, uncontradicted facts that this Court must take to be true pending the hearing that has so far been denied to Mr. Sankofa reveal that Mr. Sankofa very probably did not commit the crime for which he was convicted. At the least, no properly informed juror could have found him guilty of the crime beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

In his initial federal habeas petition in 1988, Mr. Sankofa alleged that his trial counsel gave him ineffective assistance in failing to investigate and adduce guilt-phase defenses. Not until 1993, however, did his habeas counsel for the first time gain access to a police report (shown to trial counsel before trial) that identified numerous crime-scene witnesses, never before interviewed by the defense, whose testimony exonerates Mr. Sankofa. So, as of April 1993, when Mr. Sankofa filed his second federal petition, his was the extremely rare case in which this Court's pre-AEDPA restrictions on successive petitions in *McCleskey v. Zant*, 499 U.S. 467, 494 (1991), and *Schlup v. Delo*, 513 U.S. 298 (1995), permitted a federal habeas court to adjudicate the petition because the constitutional violation he was seeking to relitigate "'probably'" (indeed, almost certainly) "resulted in the conviction of one who was **actually innocent**." *Id.* at 322, 324, 326-27 (emphasis supplied). *See McCleskey*, 499 U.S. at 494 ("probably has caused the conviction of one innocent of the crime").

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credible. In the wake of the newly found, more pervasive evidence of ineffectiveness of trial counsel that was uncovered in 1993 – concerned with the crime-scene witnesses' exoneration of Mr. Sankofa and the exclusion of Mr. Sankofa's pistol as the murder weapon – together with the discovery in 1993 of additional evidence corroborating the alibi witnesses' efforts to testify for Mr. Sankofa despite not being contacted by Mr. Mock, Mr. Sankofa has, since 1993, asked the courts to revisit the credibility of the alibi witnesses. As with all his requests to be heard, these have been denied by the state courts and federal district court.

Nonetheless, Mr. Sankofa was not permitted to relitigate his petition in 1993, even after the State expressly waived further exhaustion of the claims in that petition and requested a federal disposition, and though the district court assumed that the allegations in the petition, if credited, would satisfy the test of actual innocence. *Graham v. Collins*, 829 F.Supp. 204, 208 (S.D.Tex. 1993).[10] The district court reached the merits of Mr. Sankofa's claims but denied the evidentiary hearing that he requested; it summarily rejected Mr. Sankofa's showing that the state-court factfindings in his case failed to satisfy the conditions entitling them to federal deference; and it denied relief. In August 1996, the Fifth Circuit ruled *sua sponte* that instead of accepting the state's waiver of exhaustion, it would send the case back to the state courts for the hearing which the federal district court had refused to hold but which the Fifth Circuit concluded was necessary for a fully informed adjudication.

In 1998, after the state courts held that no state procedure was available to Mr. Sankofa to obtain the hearing contemplated by the Fifth Circuit, Mr. Sankofa refiled his 1993 federal petition. Again the district court and Fifth Circuit refused to hear the claims of actual innocence and ineffective assistance that brought his case within the *McCleskey/Schlup* authorization for

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[10]The district court explained, in reference to only a portion of the evidence of innocence,

> The affidavits of Sherian Etuk, Ronald Hubbard, Mervyn West, and Wilma Amos Antwine, if credited, would satisfy the *Kuhlmann* [*v. Wilson*, 477 U.S. 436, 452-454 (1986)] test. The state court has determined that two of these affidavits are not credible. Rather than defer to the state court's factual findings at this stage of the inquiry, the Court will assume arguendo that the evidence Graham has presented makes out a colorable showing of factual innocence. (829 F.Supp. at 208.)

determination of the merits of successive petitions. This time, the Fifth Circuit elected to apply the outright *ban* on same-claim successive petitions with which AEDPA's amended section 2244(b)(1) had replaced the *McCleskey/Schlup* rules for cases filed after April 24, 1996.[11] In doing so, the Fifth Circuit decided that Mr. Sankofa's **right**, as of the date he filed his 1993 petition, **to be heard** on his successive ineffective-assistance claim **because he was able to show that he was innocent**, had been taken away during the succeeding five years – through no action or inaction of his own – and replaced with an absolute ban on litigating the same claim that he made in his 1993 petition, **despite** his continuing ability to establish his innocence. To reach this terminal conclusion the court of appeals had to take five steps. Each of those steps was legally erroneous and each is the subject of one of the five Questions Presented to this Court:

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[11]One might argue that the facts supporting the ineffective-assistance claim in Mr. Sankofa's second, 1993 petition are so different from those in his first petition that he is litigating a "new" claim within § 2244(b)(2) as amended by AEDPA, not the "same" claim within § 2244(b)(1). Even if § 2244(b)(2)'s definition of a "new" claim – one "presented in a second or successive habeas corpus application . . . that was not presented in a prior application," (emphasis supplied) – were construed to cover the significantly expanded, but similar, claim Mr. Sankofa presented in his 1993 petition, the result would be the same. Section 2244(b)(2)(B) replaces the *McCleskey/Schlup* requirement of **either** cause and prejudice **or** actual innocence with a requirement of cause **and** innocence; and Mr. Sankofa cannot satisfy the new provision's "cause" requirement, though he can satisfy the preexisting rule's previously conclusive "actual innocence" requirement (as well as the current provision's partially sufficient "actual innocence" requirement). For this reason, Mr. Sankofa treats the ineffective-assistance claims in his first and second petitions as the same claim. (Because of the somewhat obscure way in which the Fifth Circuit opinion below describes a "concession" made by Mr. Sankofa, it is important to be clear that this is that concession. Mr. Sankofa conceded below and concedes here that *if* AEDPA applies to his 1998 petition, he cannot satisfy the requirements of amended § 2244(b). He conceded nothing more or less than this.) The basis for the Fifth Circuit's ruling, both on Mr. Sankofa's appeal from the district court's dismissal of the 1998 petition and on his request for authorization to file a successive petition under 28 U.S.C. § 2244(b)(3), was also the same – that AEDPA governed Mr. Sankofa's 1998 petition and that he was barred by § 2244(b)(1) and/or § 2244(b)(2) from prosecuting this petition.

First, the Court of appeals had to decide that the refiling in December 1998 (after further exhaustion) of Mr. Sankofa's 1993, **pre-AEDPA** successive petition, which the Fifth Circuit had ordered dismissed **without prejudice** (to permit further exhaustion) in August 1996, amounted to the filing of a **different**, **independent** successive petition -- a petition to which AEDPA applies because it was **not** filed before AEDPA (see *Lindh v. Murphy*, 521 U.S. 320 (1997)). To reach this conclusion, the Fifth Circuit had to reject the plain text of *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), which speaks to precisely this situation, in which "[t]here was only *one* application for habeas relief," namely, the **pre-AEDPA** application that first became "ripe" for adjudication after subsequent state proceedings. 118 S.Ct. at 1621 (emphasis supplied) . The Fifth Circuit took this step although the delay in adjudication of Mr. Sankofa's pre-AEDPA application for habeas relief was not his doing – since the State itself had agreed with him, by expressly waiving exhaustion at the time of the 1993 petition, that all remaining proceedings could and should appropriately occur in federal court – but was the result of the Fifth Circuit's own preference to return the case yet again to the state courts. Moreover, the crucial predicate for the Fifth Circuit's *sua sponte* decision to send the case back for further state proceedings that could resolve the pertinent factual disputes was that the **federal district court** had failed to hold the very evidentiary hearing that Mr. Sankofa had timely and vigorously requested.

Second, the Fifth Circuit had to decide that Congress "expressly prescribed" that AEDPA would govern cases such as this, notwithstanding any retroactive effects that its application would cause. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). In the absence of an

express prescription and in the face of retroactive effects, *Landgraf*'s judicial "default" rule forbidding retroactive application would govern. Disagreeing with the Third, Sixth, and D.C. Circuits while finding support in the Second (and indirectly in the Eighth and Tenth) Circuits, the Fifth Circuit answered the express-prescription question in the affirmative, saying – with no discussion of the statutory language or structure – that "[i]t appears to us that, on its face, AEDPA applies to Graham's application." 168 F.3d at 775; see also *id.* at 782-783.

Third, the Fifth Circuit had to decide, in the alternative, that "even if Congress's intent on this score is not clear, § 2244(b) [does] not [have] impermissibly retroactive" effects. *Id.* at 782. To reach this conclusion, the court had to craft a formula that requires more than *Landgraf*'s generally applicable definition of retroactive effects, plainly satisfied here by the "new" and devastating "legal consequences" which AEDPA's revision of § 2244(b) would attach to the pre-AEDPA "events" surrounding Mr. Sankofa's 1988 and 1993 habeas petitions. Again in conflict with decisions of the Third, Sixth and D.C. Circuits, the Fifth Circuit devised such a formula by (a) coining a novel standard of retroactivity that requires proof of "reasonable detrimental reliance," and then (b) defining the kind of reliance that is "reasonable" in a manner that departs so substantially from the established rules of pre-AEDPA habeas law as to call for this Court's supervision under *Lonchar v. Thomas*, 517 U.S. 314 (1996), and Supreme Court Rule 10(a). Mr. Sankofa's Third Question Presented subsumes both the Fifth Circuit's result-oriented substitution of its own test for the Court's *Landgraf* test of retroactive effects and its rewrite of preexisting habeas law in the process of finding Mr. Sankofa's reliance upon that law unreasonable.

Fourth, having determined that AEDPA applied to Mr. Sankofa's refiling of his petition

in December 1998 and transformed the Court of appeals' 1996 decision from a procedural ruling aimed at improving the quality of adjudication of Mr. Sankofa's 1993 petition into a terminal foreclosure of **any** adjudication of the merits of his constitutional contentions, the Fifth Circuit then had to decide that it lacked the power to recall its 1996 mandate to avoid such a perverse result. To do this, the court read *Calderon v. Thompson*, 523 U.S. 538 (1998) – which limited motions to recall a mandate in habeas cases "on the basis of **the merits of the underlying decision**" – as if it likewise forbade motions to recall the mandate issued on a decision **declining** to reach the merits. Doing so rendered the court powerless to recall the mandate of its1996 decision in order to keep the aim of that decision from being frustrated and from being turned into a death trap by accreting consequences the court in 1996 did not anticipate at all (or give the parties an opportunity to anticipate), let alone endorse on the merits.

Fifth, the Fifth Circuit had to decide that it could act in this fundamentally unfair way without violating Due Process. So it held. *See* 168 F.3d at 788-789.

We discuss in turn below the reasons why each of these five erroneous conclusions warrants the Court's review.

1. The Fifth Circuit's holding that the refiling of Mr. Sankofa's pre-AEDPA petition amounted to the filing of a new federal habeas proceeding, to which AEDPA applies, flouts this Court's reasoning in *Stewart v. Martinez-Villareal.*

In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), the capital habeas petitioner filed a federal habeas petition in March 1993.[12] The district court dismissed his claim

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[12]This petition was actually the fourth federal petition filed by Martinez-Villareal, but the prior petitions had all been dismissed for lack of exhaustion. Accordingly, the March, 1993 petition was still considered the first petition. *See Rose v. Lundy*, 455 U.S. 509, 520-522 (1982).

that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), as premature (because the petitioner had no pending execution date), but granted relief on other grounds. The Ninth Circuit reversed the grant of relief "but explained that its instruction to enter judgment denying the petition was not intended to affect any later litigation of the *Ford* claim." 118 S.Ct. at 1620. Thereafter, an execution date was set; the petitioner exhausted state remedies on his *Ford* claim; and he returned to federal court. By this time, AEDPA had been enacted. The district court treated the refiling of the *Ford* claim as the filing of a "second or successive" habeas petition, applied AEDPA, and dismissed the petition because AEDPA forbids the filing of successive petitions without prior leave of a Court of appeals. The Ninth Circuit disagreed and remanded to the District court on the ground that § 2244(b) as amended by AEDPA does not apply to a petition raising only a *Ford* claim and, thus, Martinez-Villareal did not need the Court of appeals' permission to proceed.

This Court in turn concluded that the Ninth Circuit's decision was right, not because § 2244(b) does not in principle apply to *Ford* claims, but because under the circumstances of the Martinez-Villareal case the petition presenting his *Ford* claim was not a "second or successive application" for a writ of habeas corpus within § 2244(b) The Court's analysis of why the *Ford* petition was not a new and thus successive application teaches much about the relationship between a petition that is dismissed without an adjudication on the merits and a subsequent petition re-raising the same claims.

The Court analogized the dismissal of a claim because it is premature to the dismissal of a claim because it has not been exhausted. 118 S.Ct. at 1622. "[I]n both situations, the habeas petitioner does not receive an adjudication of his claim." *Id.* In both situations, the Court found,

the petitioner is entitled to return to federal court, following the removal of the procedural reason that prompted dismissal, and obtain a ruling on the merits of his or her claim. The reason for this result is that **the second petition is not a separate, distinct habeas application, but is a continuation of the first**. As the Court explained,

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but **this does not mean that there were two separate applications**, the second of which was necessarily subject to § 2244(b). **There was only one application for habeas relief**, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. (118 S.Ct. at 1621 (emphasis supplied).)

This analysis applies just as clearly to Mr. Sankofa's situation. The refiling in 1998 of his 1993 claims which had been dismissed without an adjudication on the merits – and explicitly "without prejudice" to such an adjudication – in order to permit further exhaustion of state remedies, may have been "the second time that [Mr. Sankofa] had asked the federal courts to provide relief on his ... [successive ineffective-assistance] claim, but this does not mean that there were two separate applications...." *Id.* "There was only one application for habeas relief...." *Id.* As in *Martinez-Villareal*, the "one application for habeas relief" must necessarily be the initial one raising the claim as to which adjudication was postponed until state-court action ripened it.[13]

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[13]The question in *Martinez-Villareal* was whether the filing, followed by a "post-ripeness" refiling, of the prisoner's first petition raising a *Ford* claim amounted to the filing of two petitions. The question here is whether the filing, followed by a post-ripeness refiling, of a first successive petition amounts to the filing of two distinct successive petitions. Although on its face *Martinez-Villareal* is a case about *counting* petitions, what it says about counting is equally applicable to analyzing the *dating* of petitions (no matter whether they are first or successive petitions) over time. For if the **second** filing of a petition raising a claim that was previously dismissed without adjudication amounts to filing only **one** application for habeas relief on that claim, then the **second** filing of a successive petition that was previously dismissed

Because under these principles, Mr. Sankofa's 1998 habeas petition was the same application as, and simply continued, his 1993, pre-AEDPA application, AEDPA could not properly be applied to it. As the Court held in *Lindh v. Murphy*, 521 U.S. 320 (1997), "the new provisions [effected by AEDPA] of chapter 153 [28 U.S.C. §§ 2241-2255] apply only to cases filed after the Act became effective" and not to "case[s] pending when the Act took effect." *Id.* at 336. If the filing of a post-AEDPA petition is the resumption of a petition filed before AEDPA – and not a "separate application," *Martinez-Villareal*, 118 S.Ct. at 1621 – the post-AEDPA petition cannot be fairly characterized as a "case[] filed after the Act became effective." *Lindh*, 521 U.S. at 336.

The Fifth Circuit rejected the plain language of *Martinez-Villareal*, saying:

> [T]he Court [in *Martinez-Villareal*] held simply that a habeas claim that has not been adjudicated on the merits is not 'successive' under AEDPA even if it has been brought before the courts before and dismissed on procedural grounds. Both where a claim is dismissed as premature and for failure to exhaust state remedies, 'the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.' [118 S.Ct. at 1622.] The Court's conclusion provides no indication that the dismissed application should be treated as a continuation of the first so as to preclude the application of AEDPA. (168 F.3d at 776-777.)

This parsing of *Martinez-Villareal*, especially the last sentence quoted, is incomprehensible. The reason explicitly stated in *Martinez-Villareal* for holding that the refiling of a petition previously dismissed without adjudicating the merits does not amount to the filing of a successive application is that the refiled petition and the previous petition are not "two separate applications" but "only one application for habeas relief" – namely the one initially filed but not

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without adjudication amounts to filing only **one** successive application -- and that is necessarily the earlier, pre-AEDPA application.

adjudicated because unripe. 118 S.Ct. at 1621. Failing to discern the rationale of *Martinez-Villareal*, the Fifth Circuit disregarded *Martinez-Villareal*'s straightforward application to Mr. Sankofa's case.

The Fifth Circuit found support for its reductionist reading of *Martinez-Villareal* in two additional arguments. First, it noted that "the Court applied AEDPA in reaching its result" in *Martinez-Villareal*, thus suggesting that this Court rejected the reading that Mr. Sankofa gives to its decision. 168 F.3d at 777. This is not correct. The holding of *Martinez-Villareal* was that § 2244(b), the only AEDPA provision whose application the state sought and the petitioner opposed, did **not** apply to the case. It is of no consequence that there may have been additional reasons for the same conclusion, reasons outside the certiorari questions presented and the arguments made to this Court, for example that under *Lindh*, Martinez-Villareal's single habeas application was not a "case[] filed after the Act became effective," *Lindh*, 521 U.S. at 336. What is consequential here is that the Court's own explanation for rejecting § 2244(b)'s application – that Mr. Martinez-Villareal's pre-AEDPA petition for *Ford* relief, which was dismissed without prejudice as unripe, and his post-AEDPA petition, were the same **one** federal habeas corpus application – establishes beyond reasonable cavil, when combined with *Lindh*, that AEDPA does not apply to a case like Mr. Sankofa's.

Second, the Fifth Circuit said that Mr. Sankofa's reading of *Martinez-Villareal* "would eviscerate the AEDPA limitation period and thwart one of AEDPA's principal purposes," 168 F.3d at 780, by "allow[ing] a prisoner to avoid AEDPA (and, *inter alia*, its statute of limitations) for many years after the passage of the statute." *Id.* at 779 (parenthetical in original text). The Sixth Circuit recently addressed and rejected this concern in a similar context in *In re Hanserd*,

123 F.3d 922 (6th Cir. 1997). After deciding that a petitioner who filed his first petition before AEDPA and his successive petition after AEDPA could not fairly be governed by AEDPA's successive-petition standards – which would otherwise have precluded consideration of the successive petition – the Court explained,

> Nor is allowing inmates in Hanserd's position to move for relief under § 2255 incompatible with Congress's intent in enacting AEDPA. The AEDPA is in large part intended to prevent state and federal inmates from continuing to flood the federal courts with challenges to their confinement and to put a stop to what many see as the use of multiple federal habeas corpus petitions to delay the execution of those sentenced to death. Our holding means that federal inmates will have one post-AEDPA bite at the apple, limited further, for prisoners who filed a § 2255 motion before AEDPA's enactment, by the old abuse-of-the-writ standard. One motion per federal prisoner with a colorable *Bailey* [*v. United States*, 516 U.S. 137 (1995)] claim is hardly a flood, and offers little opportunity for delay. (*Id.* at 933.)

That some prisoners will be given a period of litigation sufficient to allow them one adjudication on the merits of claims originally filed before AEDPA, inconclusively resolved, and therefore refiled after AEDPA, does not answer the question whether this is appropriate in light of AEDPA's purposes. Obviously, it is permissible in some circumstances, as the ruling in *Martinez-Villareal* itself demonstrates. To the extent that the Fifth Circuit was implying that petitioners like Mr. Sankofa might be encouraged to abuse the writ ("allow[ing] a prisoner to avoid AEDPA ... for many years," *Graham*, 168 F.3d at 780), such a concern is baseless, because the crucial circumstance that removes prisoners like Mr. Sankofa from AEDPA's regime is an action that they took **before** AEDPA was enacted – here, the filing of a 1993 petition raising the very same claim that remains in issue today – at a time when the prisoner would have had to be clairvoyant to seize a then-unrecognizable opportunity to "abuse" the writ. Moreover, the limited, temporary removal of some of these prisoners' successive claims from regulation by

AEDPA does not leave them unrestrained; it simply leaves them subject to the Court's less preclusive, but nonetheless highly preclusive, *McCleskey* rule.

2. Even if Mr. Sankofa's refiling of his 1993 petition in 1998 amounted to the filing of a post-AEDPA petition, the Fifth Circuit's determination that Congress intended the new § 2244(b) provisions to apply to such a petition (a) disregards the requirement that Congress express such an intent unambiguously, and (b) conflicts with the decisions of the Third, Sixth, and D.C. Circuits on this same important matter.

Concluding that Mr. Sankofa's 1998, post-exhaustion refiling of his 1993 petition counts as a 1998, not a 1993, petition was only the first of several steps the Fifth Circuit had to take to justify applying new § 2244(b)'s absolute ban on same-claim successive petitions instead of the *McCleskey/Schlup* "actual innocence" test. The next step was to conclude that Congress intended AEDPA to govern such cases, even when it would have a retroactive effect. That question is controlled by the plain-statement rule of *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), which says that unless Congress "has **expressly prescribed** the statute's proper reach," *id.* (emphasis supplied), the ordinary judicial "default" rules (discussed in Part 3 below) must be used to determine the applicability of AEDPA to petitions like Mr. Sankofa's.

On the face of it, the Fifth Circuit's explanation for finding the *Landgraf* plain-statement rule satisfied is insufficient, namely, that "it appears to us that Congress fully intended that AEDPA govern applications such as Graham's." 168 F.3d at 782. The rationale for this conclusion was set out earlier in the Court's opinion:

> It appears to us that, on its face, AEDPA applies to Graham's application. The statute was enacted on April 24, 1996, and Graham did not file his current federal habeas application until November 18, 1998.[14] In *Lindh v. Murphy*, 521 U.S.

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[14]Actually, the petition was filed **December** 18, 1998.

> 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the Supreme Court held that 'the new provisions of chapter 153 [the chapter of Title 28 of the United States Code containing § 2244 and §§ 2253-2255] generally apply only to cases filed after the Act became effective.' We are comforted in our conclusion by the fact that, in *Felker v. Turpin*, 518 U.S. 651, 655-58, 665, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court applied AEDPA to a successive application filed after April 24, 1996 where the first application was filed before that date. It seems equally apparent that § 2244(b)'s restrictions on second or successive habeas applications govern Graham's current application, which he concedes is second or successive within the meaning of the statute. (168 F.3d at 775.)

This reasoning, as a basis for determining that Congress has prescribed the temporal reach of AEDPA's successive-petition rules, is altogether wrong. Nothing in the text or legislative history of AEDPA suggests that Congress even considered the question. Nor does the Fifth Circuit make any effort to discern what Congress might have intended had it realized the effects that retroactive application of AEDPA's new successive-petition standards could have upon petitioners who litigated their first petitions before AEDPA.

The reason the Fifth Circuit pointed to nothing in the text or legislative history of AEDPA to support its view that "Congress fully intended that AEDPA govern applications such as Graham's," is that there **is** nothing. The only occasions on which "this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4. The Fifth Circuit's failure to point to such language, and the absence of any such language in AEDPA, means that there is no support for the Fifth Circuit's conclusion.

The Fifth Circuit's substitute reasoning is equally unsupported. Though *Felker* did consider the application of AEDPA to the post-AEDPA successive petition there, the Court left open whether AEDPA applied to its original jurisdiction. 518 U.S. at 663. Moreover, Felker's

successive petition failed to meet the criteria for prosecuting successive petitions under *McCleskey* as well as AEDPA. *Id.* at 658. Thus, there was no need for the Court to decide the issue presented by Mr. Sankofa's case, where the petitioner would be able to prosecute his successive petition under pre-AEDPA standards but not under post-AEDPA standards. For that reason, "[t]he Court in *Felker* did not purport to decide whether the [AEDPA's successive-petition] gatekeeping restrictions should be applied to cases arising before AEDPA's enactment...." *In re Hanserd*, 123 F.3d at 933. The Fifth Circuit has stretched *Felker* beyond recognition.

There is a further reason to grant certiorari on this issue. The Third, Sixth, and D.C. Circuits disagree with the Fifth Circuit regarding Congress' expressed intent on this question. As the Fifth Circuit acknowledged in *Graham*, 168 F.3d at 782, the Third and D.C. Circuits have followed the lead of the Sixth Circuit in holding that Congress gave no guidance as to whether AEDPA's successive-petition restrictions were intended to apply to cases in which the first petition had been filed prior to AEDPA. As the Sixth Circuit explained in *In re Hanserd*,

> This case presents us primarily with the question of whether AEDPA's new restriction on filing multiple § 2255 motions 'is the type of provision that should govern cases arising before its enactment.' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1504, 128 L.Ed.2d 229 (1994). Because Congress has not expressed any clear intent as to the answer to this question, we must resort to *Landgraf*'s default rules to decide the question. (123 F.3d at 924.)

The Third and D.C. Circuits agree. *See In re Minarik*, 166 F.3d 591, 599 (3d Cir.1999) ("[b]ased on our reading of *Landgraf* and *Lindh*, we join two other courts of appeals in holding that AEDPA contains no unambiguous guidance regarding retroactive application of AEDPA's new 'second or successive' petition standards and procedures to cases in which the first habeas petition was filed before AEDPA's enactment"); *United States v. Ortiz*, 136 F.3d 161, 165

(D.C.Cir.1998) ("Congress did not expressly indicate whether the AEDPA amendments to the procedures and standards for filing second § 2255 motions are to be applied in cases where the first § 2255 motion was filed before the enactment of AEDPA").

Because this aspect of the Fifth Circuit's ruling in Mr. Sankofa's case, if correct, is a sufficient basis for the Fifth Circuit's decision, and because Mr. Sankofa would not have lost on this basis if his case were in the Third, Sixth, or D.C. Circuits, certiorari should be granted.

1. (A) The Fifth Circuit's conclusion that applying AEDPA's § 2244(b) has no retroactive effect in the absence of "reasonable detrimental reliance" conflicts with *Landgraf*'s quite different test for retroactive effects and with decisions of the Third, Sixth, and D.C. Circuits finding retroactive effects under *Landgraf* in cases like Mr. Sankofa's without requiring "detrimental reliance."

(B) Even if "reasonable detrimental reliance" were required, the Fifth Circuit's conclusion that Mr. Sankofa has not shown such reliance departs so far from settled principles of pre-AEDPA law as to call for the exercise of this Court's supervisory powers under *Lonchar v. Thomas*, 517 U.S. 314 (1996).

A. The Fifth Circuit's adoption of a "reasonable detrimental reliance" test for measuring retroactive effects

Recognizing the weakness of its "plain statement" conclusion, the Fifth Circuit held alternatively that under *Landgraf* s judicial default rules, the application of revised § 2244(b) was "not impermissibly retroactive." 168 F.3d at 782. The fulcrum of this holding is that to apply a change in law to pre-enactment incidents is not impermissibly retroactive unless the party who contends that it is can show that he or she reasonably and detrimentally relied on the previous version of the law. The Fifth Circuit thus foisted a spurious concept of "retroactive effect" onto the definition that this Court adopted, after exhaustive consideration, in *Landgraf*. Such a concept conflicts not only with *Landgraf* but with three other circuits' analyses of the question

whether the application of AEDPA's § 2244(b) to cases like Mr. Sankofa's has retroactive effects.

The Fifth Circuit acknowledged that *Landgraf*'s default rules preclude retroactive application of changes in the law where such application "'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" 168 F.3d at 781 (quoting *Landgraf*, 511 U.S. at 280). What this principle meant to the Fifth Circuit, however, was that a successive habeas petitioner must show that he or she "relied on pre-AEDPA law in filing a previous application," 168 F.3d at 784:

> A number of our fellow courts of appeals, following the high Court's guidance, have analyzed this issue in terms of whether AEDPA bars the successive habeas application of a prisoner who relied on pre-AEDPA law in filing a previous application. We find this approach sensible and correct given that retroactivity is disfavored precisely because it upsets settled expectations; if a litigant in no way relies on existing law, then a change in that law cannot fairly be said to harm him. (*Id.* at 783-784.)[15]

Citing *Pratt v. United States* (one of the fellow-circuit decisions collected in note 15 *supra*), 129 F.3d at 59, the Fifth Circuit added that "even when a prisoner subjectively relies to his detriment on pre-AEDPA law, he is exempt from the new statute only if his reliance was reasonable."

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[15]The Fifth Circuit noted that the following circuits are in agreement with it on this question: the **First**, citing *Pratt v. United States*, 129 F.3d 54, 59 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1807 (1998) (habeas petitioner must "show that he consciously chose to withhold a potential ground for relief from his first petition because he detrimentally relied upon pre-AEDPA law"); the **Seventh**, citing *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997) ("Alexander has not furnished any evidence that, when omitting issues from his first collateral attack, [begun] in 1995, Alexander relied on a plausible belief that the approach then governing – the 'abuse of the writ' doctrine detailed in *McCleskey v. Zant*, 499 U.S. 467 (1991) – would have permitted a successive collateral attack"); and the **Eleventh**, citing *In re Magwood*, 113 F.3d 1544, 1552 (11th Cir. 1997) ("[t]he present case, however, is distinguishable ... because Petitioner has not relied to his detriment on pre-AEDPA law").

Applying this notion to Mr. Sankofa's case, the Fifth Circuit determined that the relevant petition to consider in connection with the issue of possible detrimental reliance was Mr. Sankofa's first petition, filed in 1988, because it is "the 1988 application, not the 1993 application, that makes Graham's current application successive and potentially subject to § 2244(b)." 168 F.3d at 786. The court quickly concluded that "Graham has not alleged detrimental reliance on pre-AEDPA law in 1988, and he cannot even plausibly claim that he might have acted differently had he known that AEDPA later would bar his claims." *Id.* The court reasoned that:

> Even under pre-AEDPA law, a prisoner was required to present all his claims in his first application, *see McCleskey*, 499 U.S. at 494-95 (holding that a prisoner wishing to bring a new claim in a second or successive habeas application had to show either that the application did not constitute an 'abuse of the writ' or that he had made 'a colorable showing of innocence'), and it would not have been reasonable for Graham consciously to hold back claims that he has conceded ... he could have included in the 1988 application. Thus, ... Graham defied pre-AEDPA law by neglecting to include claims and evidence that he could have discovered in 1988 in his first application. Accordingly, AEDPA is not retroactive with respect to Graham's 1988 application under any detrimental reliance approach. (*Id.*)

In adopting a "detrimental reliance" test for retroactive effects, the Fifth Circuit – along with the First, Seventh, and Eleventh Circuits – departed from *Landgraf*'s own reasoning. After a comprehensive effort to distill the prior case law into a set of rules for future cases, the Court held in *Landgraf* that the test of whether a new statute has retroactive effects is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. This definition was based upon scores of cases going back to the 18th Century and marks the contours of what the Court has always held to be retroactive effects. 511 U.S. at 269-70 & n. 23 (citing numerous cases). *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The Court was

at pains to enumerate a wide range of ways in which a "new legal consequence" may be found, never once suggesting that "detrimental reliance" on previous law is a necessary part of the test. Thus, among the kinds of statutory provisions that it said have "retroactive effects" are those that:

(1) "affect[] substantive rights," 511 U.S. at 278,

(2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280,

(3) "sweep away settled expectations suddenly and without individualized consideration," *id.* at 266,

(4) "'change[ ] the legal consequences of acts completed before [the new law's] effective date,'" *id.* at 269 n. 23,

(5) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,'" *id.*,

(6) "impos[e] new burdens on persons after the fact," *id.* at 270, or

(7) may be "retributive," *id.* at 282.

This is wholly consistent with the precedents. As the Court noted in a footnote in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), only "one line of cases" – comprised of three decisions, the latest decided 58 years ago – treats reliance as a "significant" factor. *Id.* at 18 n.16. Moreover, *Usery* and two of the cases it cites are part of a much longer and more distinguished line of decisions – all of them taken by *Landgraf* as authoritative – in which courts have found retroactive effects despite the clear absence of reliance interests affected by the new statute.[16]

Concededly, the Fifth Circuit is only one of four that have ignored this aspect of

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[16]Because the decisions in which the courts have found retroactive effects despite the clear **absence** of reliance interests affected by a new statute are so numerous, we have collected some in Appendix 8 to illustrate our point further.

Landgraf and its forerunners. But three other circuits have read *Landgraf* more carefully. The Third, Sixth, and D.C. Circuits have all rejected the detrimental-reliance approach espoused by the First, Fifth, Seventh, and Eleventh, and have done so specifically in the successive-habeas-petition context. *See In re Hanserd*, 123 F.3d 922 (6th Cir. 1997); *In re Minarik*, 166 F.3d 591, 599 (3d Cir.1999); and *United States v. Ortiz*, 136 F.3d 161, 165 (D.C.Cir.1998).[17] In each of these cases, the petitioner had filed a pre-AEDPA 2254 petition or 2255 motion and sought to file a successive 2254 petition or 2255 motion after AEDPA's enactment. In each case, the court ruled that the operative test for determining whether the application of AEDPA's successive-petition rules would be impermissibly retroactive was whether the petitioner would have been allowed to file a successive petition under pre-AEDPA law. If the petitioner could have filed a successive petition under the pre-AEDPA criteria but would be precluded from filing it under the AEDPA criteria, then the application of AEDPA would be impermissibly retroactive. No showing of detrimental reliance is required. As the court explained in *Hanserd*, 123 F.3d at 931:

> When Hanserd filed his initial § 2255 motion, the law would have allowed him to raise a *Bailey* claim in a second motion....[18] Under AEDPA, however, he may not.[19] Applying the new statute would thus attach a severe new legal

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[17]Acknowledging this circuit split, the Seventh Circuit described it as "well established" and noted that "[t]he Supreme Court will have to resolve the conflict." *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998). The Fifth Circuit acknowledged the split as well in *Graham*. 168 F.3d at 785 & n.17.

[18] Hanserd would have been able to show cause and prejudice under *McCleskey*. *See Hanserd*, 123 F.3d at 928-929.

[19] Hanserd's claim was neither based upon a new rule of constitutional law, 28 U.S.C. § 2255 (second (2)) – which is the counterpart to § 2244(b)(2)(A) for § 2254 cases – nor upon newly discovered evidence, 28 U.S.C. § 2255 (second (1)) -- which is the counterpart to § 2244(b)(2)(B)(i) for § 2254 cases. 123 F.3d at 929.

> consequence to his filing a first motion: he would have lost his right to challenge his sentence.... *See Landgraf*, 511 U.S. at 280.... Because Congress has not expressed an intent that the new Act have such a retroactive effect, we could not apply AEDPA in this way. (Citations and footnote omitted.)

The Third Circuit reasoned similarly in *Minarik*, 166 F.3d at 600 –

> [i]n those cases where a prisoner in state custody had a right to prosecute a second or successive petition prior to AEDPA's passage, but would be deprived of that right by ... [§ 2244(b)'s] new gatekeeping provisions, we conclude that applying the AEDPA standard would have a 'genuine retroactive effect' because it would attach a new and adverse consequence to pre-AEDPA conduct – the prosecution of the original proceeding

– as did the D.C. Circuit in *Ortiz*, 136 F.3d at 166 –

> the new standards and procedures under AEDPA for filing § 2255 motions could only be improperly retroactive as applied to Ortiz if he would have met the former cause-and- prejudice standard under *McCleskey* and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA.[20]

This approach to retroactive effects – turning on the visitation of new, more harmful consequences rather than on "detrimental reliance" – is especially appropriate in connection with capital habeas corpus proceedings. The pre-AEDPA rules which permitted the filing of a second or successive petition upon a showing of cause-and-prejudice **or** of actual innocence developed in this context. Where claims or facts supporting previously-raised claims were omitted from a

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[20] Under these circuits' analyses, if the petitioner would not have met the *McCleskey* requirements for prosecuting a successive petition, "these courts have concluded that there is no genuine retroactive effect and the AEDPA standard may be applied." *Minarik*, 166 F.3d at 601. *See also Hanserd*, 123 F.3d at 932 ("[w]here the old and the new law lead to an identical result, there is no need to conduct a retroactivity analysis because the new law has not attached any new consequences to pre-enactment conduct or upset settled expectations"); *Ortiz*, 136 F.3d at 167 (applying AEDPA's new standard to deny the petitioner's second § 2255 motion produced no impermissible retroactive effect because petitioner "failed to meet the requirements of the former 'abuse of writ' standard of *McCleskey*, and the new AEDPA standards").

first petition and there was insufficient "cause" for it, a showing of actual innocence would nonetheless suffice to authorize the hearing of a successive petition on the merits. In this way, the "quintessential miscarriage of justice ... [*i.e.*,] the execution of a person who is entirely innocent," *Schlup v. Delo*, 513 U.S. 298, 324-325 (1995), could be avoided. Such a rule was a necessary part of the fabric of pre-AEDPA habeas law, for this was a period of time – prior the decision in *McFarland v. Scott*, 512 U.S. 849 (1994) – when most capital habeas petitioners were represented by *pro bono* counsel whose only investigative resources were provided out of their own pockets. Issues and critical factual matters were sometimes missed, not intentionally but inadvertently, under those circumstances. There needed to be a failsafe mechanism to allow for the presentation of claims by actually innocent people, whenever that evidence was discovered, and regardless of whether it should have been discovered earlier. The *McCleskey/Schlup* successive-petition rule provided that mechanism.

In this context, there will rarely be a showing of "reasonable detrimental reliance" upon the successive-petition principles articulated by *McCleskey*. Counsel usually did the best they could do, but sometimes they missed vitally significant issues and facts in first petitions. They did not miss or omit them in specific reliance on the successive-petition rules. However, the existence of those rules allowed some recourse if truly significant facts or claims surfaced later which counsel had missed in connection with the first petition. It is this failsafe mechanism – which was woven into federal habeas law in 1988 when Mr. Sankofa's first petition was filed and in 1993 when his successive petition was filed – which AEDPA later stripped away.

Had Mr. Sankofa's case arisen in the Third, Sixth, or D.C. Circuits, he would not be here now. These circuits would have determined that because AEDPA threatened to attach new legal

consequences to the filing of his first, 1988, petition, it could not be applied retroactively to bar his second successive petition. The Court should grant certiorari to correct this geographic quirk.

B. The Fifth Circuit's application of the "reasonable detrimental reliance" test to Mr. Sankofa's case

Mr. Sankofa argued in the Fifth Circuit that if detrimental reliance **were** relevant to the issue of the retroactivity of § 2244(b), it should be found in his circumstances. He pointed out that when he decided not to go back to the state courts with another state habeas petition in 1993 after discovering from the long-hidden police report still further evidence supporting his claims of innocence and trial counsel's ineffectiveness, he reasonably relied on the then-existing framework of exhaustion law and successive-petition law. He believed that the rules of exhaustion did not require repeated returns to the state courts to present later-discovered evidence of the same basic claims when those claims had already been strong at the time the state courts rejected them. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) ("the supplemental evidence presented by [the prisoner] did not fundamentally alter the legal claim already considered by the state courts..."). The extant Fifth Circuit law supported this belief. *See Hart v. Estelle*, 634 F.2d 987, 989 (5th Cir. 1981) (new facts in support of claims first presented in federal habeas proceeding require re-exhaustion only if they turn a "weak" case in state court into a "strong" case in federal court); *Joyner v. King*, 786 F.2d 1317, 1319-20 (5th Cir.), *cert. denied*, 479 U.S. 1010 (1986) (same); *Brown v. Estelle*, 701 F.2d 494, 495-496 (5th Cir. 1983) (same). And Mr. Sankofa also believed that if a federal court **did** conclude that he should be required to undertake another round of exhaustion litigation in the state courts, he could then return to federal court in no worse position relative to the applicable successive-petition rules than he was in to start with:

that is, he would have to meet the actual-innocence requirements of *Kuhlmann* and *McCleskey*, just as he had to do in filing his successive petition in 1993.

The Fifth Circuit responded to this argument by holding that Mr. Sankofa's reliance was not reasonable:

> [H]e had no right to place any reliance on the filing of an unexhausted application. Under *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-12 (1992), he was required to present his new evidence to the state courts before bringing it to federal court. Although the state waived the exhaustion requirement, it did so after Graham decided to file his unexhausted application and could have played no role in his initial decision to file. Thus, Graham's reliance argument boils down to this: He deliberately flouted federal law by filing an unexhausted application, expecting that if it were dismissed without prejudice, he could return to state court and then, perhaps, to federal court under the same law that had been in effect when he filed the unexhausted application. We find such reliance patently unreasonable. (168 F.3d at 786-787 (footnotes omitted).)

Tamayo-Reyes, of course, **began** its analysis from the premise that a material fact necessary to support Tamayo-Reyes' federal claim had **not** been developed in the state courts as a result of his lawyer's negligence. *See* 504 U.S. at 4-5. The case thus presented no issue as to whether, after substantial evidence in support of a federal claim **has** been submitted to a state court and rejected by it, the discovery of additional evidence strengthening an already-strong claim requires re-submission to the state courts to satisfy the requirement of exhaustion of state remedies. *Tamayo-Reyes* did not examine the Fifth Circuit case law that **did** address this issue; nor did *Tamayo-Reyes* overrule, narrow, or even cite *Vasquez v. Hillery* – the only case decided by this Court that bears upon the issue. Moreover, the holding and the sole focus of *Tamayo-Reyes* was that a habeas petitioner's failure to develop a material fact in state-court proceedings constitutes a default **unless excused by a showing of cause and prejudice**. The cause-and-prejudice question never arose in Mr. Sankofa's 1993 proceeding. But if it had arisen, Mr.

Sankofa plainly could have shown cause, because his "failure" to present the later-discovered evidence to the state courts was the result of the Harris County District Attorney's resistance to Mr. Sankofa's open-records request for access to the district attorney's file.[21] *See Strickler v. Greene*, No. 98-5864, ___ U.S. ___ (June 17, 1999) (Memorandum Opinion, at 25) (cause is shown where the material document "'was not reasonably discoverable because it was concealed by [county] officials...,'" quoting *Amadeo v. Zant*, 486 U.S. 214, 222 (1988)). And Mr. Sankofa also could have shown prejudice **if** the after-discovered evidence had proved to be sufficiently important to the disposition of his federal claim to take his case out of the rule of the *Hart/Joyner/Brown* line of Fifth Circuit cases.

But suppose that the Fifth Circuit in 1999 was right that *Tamayo-Reyes* undid *Hillery* and the *Hart/Joyner/Brown* line of cases **and** imposed not only a requirement of cause-and-prejudice but an inflexible duty upon Mr. Sankofa to take his after-discovered evidence back to state court. Even that supposition would not justify the Fifth Circuit's characterizations of his failure to do so as "deliberately flout[ing] federal law" or as "unreasonable reliance" upon his own, different reading of the case law. Whatever else "reasonable reliance" may mean, it cannot mean "**correct** reliance"; for if it did, the concept would be moot as well as misnamed. When the Fifth Circuit taxed Mr. Sankofa with acting unreasonably in 1993, it plainly was not measuring his conduct by a standard that related to the rules of habeas corpus jurisprudence in effect at that time – the body of "complex procedural principles [developed by "Congress, the Rule writers, and the courts" to] . . . regularize and thereby narrow the discretion that individual judges can freely exercise," *Lon-*

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[21] Mr. Sankofa finally obtained the file through a Texas Attorney General's order.

char v. Thomas, 517 U.S. at 322, "[e]ven in the context of 'second and successive petitions,'" where "this Court has created careful rules for dismissal of petitions for abuse of the writ." *Id.* at 324. The Fifth Circuit was, instead, holding Mr. Sankofa to a standard of its own devising, *ad hoc* as well as *post hoc*. Very much like *Lonchar*, then, this is a case within this Court's Rule 10(a), where a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

4. Having decided that AEDPA terminally barred Mr. Sankofa's 1998 petition, the Fifth Circuit wrongly refused to recall its mandate in Mr. Sankofa's 1993 habeas proceedings to avoid a miscarriage of justice; and it misread *Calderon v. Thompson*, 523 U.S. 538 (1998), as requiring the courts of appeals to treat every post-AEDPA motion by a habeas petitioner to recall a pre-AEDPA mandate as a second or successive petition for purposes of § 2244(b).

As an alternative to recognizing that Mr. Sankofa's 1998 petition was not barred by AEDPA, Mr. Sankofa asked the Court of appeals below to recall the mandate in its 1996 decision on appeal from the denial of his **1993** petition and to amend that decision to:

> permit Mr. Sankofa to reopen the habeas [petition] he filed July 22, 1993, upon the [further] exhaustion of state remedies [ordered in 1996], and upon reopening to retain the benefit of the 1993 case number and original filing date,

or in the alternative, to

> amend the mandate to remand the 1993 petition to the District Court for an evidentiary hearing on the merits of Mr. Sankofa's ineffective assistance and innocence claims, based upon the State's express and adamant waiver of exhaustion and the recognition that the State's new successive habeas application rules preclude review and resolution of the merits of Mr. Sankofa's claims.

(Brief on Appeal from District Court's Dismissal of Habeas Petition and Alternative Motion to Recall Mandate in Previous Habeas Appeal, filed January 9, 1999, No. 99-20014 (5th Cir.), at 22.) Mr. Sankofa relied on *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1498 (1998),

in support of this request, and the Fifth Circuit explicated *Thompson* in denying it:

> *Thompson* held that if a court of appeals recalls a pre-AEDPA mandate as a result of a post-AEDPA motion, AEDPA applies to the motion, although this is not true if the court recalls its mandate of its own accord. *See id.* at 1499-1500. Our consideration of Graham's argument is, quite obviously, not a *sua sponte* decision but a response to his request that we do so. AEDPA therefore applies to Graham's Motion to Recall Mandate in Previous Habeas Case; because he concedes ... that he cannot meet AEDPA's substantive requirements, we must deny that motion. (168 F.3d at 789.)

Certiorari should be granted to review this aspect of the decision below because the Fifth Circuit's exegesis of *Thompson* misreads the holding of that case and ignores the equities that *Thompson* identified as warranting the recall of an appellate mandate.

AEDPA played a role in *Thompson* because the Court there was concerned that motions to recall appellate mandates in pre-AEDPA habeas appeals might be used by prisoners to "evade . . . [AEDPA's] bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." 118 S.Ct. at 1500. Thus, the Court laid down two complementary principles. The first distinguishes between the recall of a mandate *sua sponte* and the recall of a mandate at the instance of a habeas petitioner. If a court of appeals acts on "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision," *id.*, "its action is subject to AEDPA irrespective of whether the motion is based on old claims . . . or new claims. . . ." *Id.* Second, "[i]f, in recalling the mandate, the court considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application." *Id.*

Mr. Sankofa's motion to recall the Fifth Circuit's mandate neither affronted these principles nor implicated the concern that gave rise to them. Far from asking the Court of

appeals to modify its prior decision "on the basis of the merits of the underlying decision." Mr. Sankofa asked it to recall its mandate in order to **effectuate** the prior decision and prevent its frustration through "grave, unforeseen contingencies," *Thompson*, 118 S.Ct. at 1498. In its 1996 decision in *Graham v. Johnson*, 94 F.3d 958, the Fifth Circuit ordered Mr. Sankofa to present his claims one more time to the state courts in order to give those courts another opportunity to resolve the factual disputes that had to be resolved as the precondition for making a fair determination of Mr. Sankofa's claims on the merits. As the court explained:

> The issues in this case are almost exclusively factual, and the relevant factual scenario is complex, highly controverted, and in many respects unresolved. The district court denied the petition without an evidentiary hearing. There is a large body of relevant evidence that has not been presented to the state court. It is doubtful that the record before us allows review of the underlying issues on a fully informed basis. (*Id.* at 970-971.)

Thus, the court's purpose in requiring further exhaustion was to get the case into satisfactory shape to adjudicate on the merits "on a fully informed basis"; it was **not** to anticipate the merits before the "highly controverted" "factual scenario" in question was "[ ]resolved"; and it was certainly **not** to work a terminal foreclosure of any federal adjudication of the merits of Mr. Sankofa's claims of ineffective assistance of counsel and actual innocence.[22] Such a terminal

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[22] That the Fifth Circuit chose the state courts over the district court as the locus for an evidentiary hearing – and that it did so without explanation even though it indicated that the district court's failure to hold a hearing had left it with an inadequate record – makes sense *only* if the Fifth Circuit assumed that it was legally of no consequence to Mr. Sankofa whether the hearing took place in state court or federal court. Had the Fifth Circuit believed that its choice of the state forum would have the effect of turning Mr. Sankofa's right to an eventual federal adjudication into the converse, **an absolute bar to federal adjudication**, presumably the court would have explained why it was so important to choose the state courts to fill the void created by the district court's denial of a hearing and thus deprive Mr. Sankofa of the federal adjudication to which he was entitled on his 1993 petition.

foreclosure – the product of the subsequent application of AEDPA's amended § 2244(b) to the federal petition that Mr. Sankofa refiled in 1998 after completing the exhaustion ordered by the Fifth Circuit in 1996 – totally thwarted the objective of the Fifth Circuit's 1996 mandate.

Yet, when Mr. Sankofa moved to recall the mandate for this reason, the Fifth Circuit held that *Thompson* required it to deny such a motion – indeed, to deny **any** motion made by a habeas petitioner to recall the mandate in a prior habeas appeal – *eo ipso*, simply because the motion had been made. This ruling misconceives and misappropriates the teaching of *Thompson*. Since Mr. Sankofa's motion was not made "on the basis of **the merits of the underlying decision**," 118 S. Ct. at 1500 (emphasis supplied), and did not ask the Fifth Circuit to "consider[] claims or evidence presented in a successive application for habeas relief," *id.*, it was not the sort of motion that *Thompson* said should be subjected to AEDPA's preclusive successive-petition rules.

To the contrary, Mr. Sankofa's motion invoked precisely those equities that *Thompson* recognized as warranting the recall of a mandate. In an appropriate case – such as this one, where Mr. Sankofa is not seeking to relitigate claims previously decided on the merits but only to effectuate the aim of the earlier decision that he eventually receive a hearing on the merits of his claims – *Thompson* contemplates that an appellate court will "act[] to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* at 1502. Since the miscarriage of justice standard "'is concerned with actual as opposed to legal innocence,'" *id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)), "[i]f the petitioner asserts his actual innocence of the underlying crime, he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." *Id.* at 1503 (quoting *Schlup v. Delo*, 513 U.S. at 327). That is precisely what Mr. Sankofa is prepared to

show (*see* pages 6 - 10 *supra*); and the Fifth Circuit's reading of *Thompson* as a bar to such a showing is a gross inversion of *Thompson*'s explicit reasoning.

5. The Fifth Circuit's failure to recall its mandate in the circumstances of Mr. Sankofa's case deprived him of due process because it extinguished his right to an adjudication of the merits of his claims of ineffective assistance and actual innocence although he has done nothing to warrant their eradication.

In *Logan v Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court held that due process is violated when a cause of action is extinguished as a result of delays in the adjudicative process for which the adjudicator, not the claimant, is responsible. Quoting *Société Internationale v. Rogers*, 357 U.S. 197, 209 (1958), the Court explained: "[T]he 'property' component of the Fifth Amendment's Due Process Clause ... impose[s] 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" 455 U.S. at 429. This is precisely what the Fifth Circuit did to Mr. Sankofa when it refused to recall its mandate.

Mr. Sankofa's case of ineffective assistance of counsel and actual innocence was dragged into the AEDPA era through no action or inaction of his own. In 1993, the federal district court denied his request for an evidentiary hearing that, three years later, the Fifth Circuit held was necessary to resolve his claims. The Fifth Circuit compounded the delay by deciding – without consulting the parties and in disregard of both parties' clearly expressed desire to proceed to the merits in federal court – that the evidentiary hearing should occur in the state courts. This decision was based upon the misguided speculation that there was an available state remedy – which, in fact, there was not. On his return to federal court, multiply exhausted, in 1998, Mr. Sankofa was met with the judgment that his pre-existing right to an evidentiary hearing and a

federal decision on the merits of his claims had been extinguished by AEDPA.

To be sure, the legislature retains the prerogative "to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether," *Logan*, 455 U.S. at 432, without violating due process – as Congress did here in enacting the AEDPA. *See Felker v. Turpin*, 518 U.S. at 664 ("judgments about the proper scope of the writ [of habeas corpus] are 'normally for Congress to make'"). However, courts do not have the prerogative to "deprive[] persons of their claims in a random manner," *id.* at 434; and when they do so – as was done to Mr. Sankofa here – the result offends due process. This Court should not countenance such a result, particularly when the claims that are extinguished go to show "[t]he quintessential miscarriage of justice[:] . . . the execution of a person who is entirely innocent." *Schlup v. Delo*, 513 U.S. at 324-325.

CONCLUSION

Certiorari should be granted and the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

RICHARD H. BURR*
1630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

JACK B. ZIMMERMANN
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

*Counsel of Record

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No. 98-10002

In The
Supreme Court of The United States

GARY GRAHAM,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
ATTORNEY GENERAL OF TEXAS

ANDY TAYLOR
FIRST ASSISTANT ATTORNEY GENERAL

SHANE PHELPS
DEPUTY ATTORNEY GENERAL
FOR CRIMINAL JUSTICE

GENA BLOUNT BUNN
ASSISTANT ATTORNEY GENERAL
CHIEF, CAPITAL LITIGATION DIVISION

*TOMMY L. SKAGGS
ASSISTANT ATTORNEY GENERAL

P. O. BOX 12548, CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 936-1600

ATTORNEYS FOR RESPONDENT

* COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether the lower court erred in dismissing a petitioner's fourth federal habeas petition as a successive petition under 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), when the petitioner's first federal habeas petition had been previously litigated to finality on the merits, applying the successive petition standards of the AEDPA does not offend retroactivity principles, and the fourth petition was not filed in a timely manner.

2. Whether the lower court erred in refusing to grant a petitioner's motion to recall a prior mandate when the petitioner's motion was merely an attempt to circumvent application of the successive petition bar of 28 U.S.C. § 2244(b), as amended by the AEDPA, and the petitioner failed to act with due diligence.

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No. 98-10002

In The Supreme Court of The United States

GARY GRAHAM,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through the Attorney General of Texas and files this Brief in Opposition.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the district court dismissing Graham's petition for federal writ of habeas corpus is published at *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999).

[1] For clarity, the respondent will be referred to as "the Director" and the petitioner as "Graham."

JURISDICTION

Graham seeks to invoke the jurisdiction of the Court under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Graham alleges the denial of rights guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In June 1981, Graham was indicted in Harris County, Texas, in cause no. 335378, for the capital offense of murdering Bobby Lambert in the course of committing and attempting to commit robbery and for the felony offenses of murder (two counts) and aggravated robbery. Tr 5.[2] On October 26, 1981, the State abandoned the non-capital charges and Graham entered a plea of not guilty to capital murder. Tr 110-11. The jury found Graham guilty of capital murder on October 28, 1981. Tr 63, 114. A separate punishment hearing ensued, and, on October 30, 1981, the jury answered affirmatively the three special issues submitted pursuant to the former Article 37.071 of the Texas Code of Criminal Procedure. Tr 70-72, 116.[3] In accordance with state law, the trial court (the 182nd District Court of

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[2] "Tr" refers to the documents filed in the underlying cause, or transcript, by volume and page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, by volume and page number.

[3] The trial court submitted the following special issues to the jury:
(1) Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
(2) Do you find from the evidence beyond a reasonable doubt

Harris County, Texas) assessed punishment at death. Tr 73-75.

Graham's conviction and sentence of death were automatically appealed to the Texas Court of Criminal Appeals, which affirmed in an unpublished opinion issued June 13, 1984. *See Graham v. State*, 671 S.W.2d 529 (Tex.Crim.App. 1984). Graham did not seek certiorari review to this Court.

On July 13, 1987, Graham filed his first application for state writ of habeas corpus. After an evidentiary hearing, the trial court recommended that the application be denied. In an unpublished opinion issued on February 19, 1988, the Court of Criminal Appeals denied Graham's first application for state writ of habeas corpus. *Ex parte Graham*, No. 17,568-01. Graham did not seek certiorari review to this Court.

Graham then filed his first federal habeas petition in the United States District Court for the Southern District of Texas on February 23, 1988. *Graham v. Lynaugh*, Civil Action No. H-88-563. The district court denied relief on February 24, 1988, in an unpublished opinion. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on August 31, 1988. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988). However, on June 3, 1989, this Court remanded the case for further consideration. *Graham v. Lynaugh*, 492 U.S. 915 (1989). On remand, the Fifth Circuit vacated Graham's death sentence on March 7, 1990. *Graham v. Lynaugh*, 896 F.2d 893 (5th Cir. 1990). On January

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> that there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?
> (3) Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

Tr 70-72.

3, 1992, the Fifth Circuit, however, reversed itself and denied habeas relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992). This Court granted certiorari review, and. on January 25, 1993, affirmed the denial of habeas relief. *Graham v. Collins*, 506 U.S. 461 (1993). On March 1, 1993, the Court denied rehearing. *Graham v. Collins*, 507 U.S. 968 (1993).

On April 20, 1993, Graham filed a second application for state writ of habeas corpus. That application was denied by the Court of Criminal Appeals on April 27, 1993. *Ex parte Graham*, 853 S.W.2d 564 (Tex.Crim.App. 1993) (No. 17,568-02). This Court denied certiorari review on May 24, 1993. *Graham v. Texas*, 508 U.S. 945 (1993). On June 2, 1993, the Court of Criminal Appeals overruled a motion for reconsideration filed by Graham. *Ex parte Graham*, 853 S.W.2d 565 (Tex.Crim.App. 1993) (No. 17,568-03).

In the interim, on April 28, 1993, Graham had filed a second federal habeas petition in the United States District Court for the Southern District of Texas, which he voluntarily dismissed the day it was filed. On July 22, 1993, Graham filed his third federal habeas petition in the United States District Court for the Southern District of Texas. *Graham v. Collins*, Civil Action No. H-93-2217. The district court denied relief on August 13, 1993. *Graham v. Collins*, 829 F.Supp. 204 (S.D.Tex. 1993). On August 28, 1996, the Fifth Circuit, declining to accept the State's waiver of the exhaustion requirement, remanded the third federal habeas petition to the district court with directions to dismiss the petition without prejudice for failure to exhaust state court remedies. *Graham v. Johnson*, 94 F.3d 958 (5th Cir. 1996). Graham's motion for rehearing was denied on September 26, 1996. On remand, the district court entered an order on October 11, 1996, dismissing Graham's third federal habeas petition without prejudice for failure to exhaust state court remedies.

Graham sat idle for more than one and a half years, then filed his third application for

state writ of habeas corpus on April 27, 1998. In an unpublished opinion issued on November 18, 1998, the Court of Criminal Appeals dismissed that application pursuant to Texas' statutory prohibition against successive applications. *Ex parte Graham*, No. 17,568-05. Graham did not seek certiorari review to this Court.

On December 18, 1998, Graham filed his fourth federal habeas petition in the United States District Court for the Southern District of Texas. *Graham v. Johnson*, Civil Action No. H-98-4241. On January 7, 1999, the district court found that it lacked jurisdiction to consider the petition and dismissed the petition. *Graham v. Johnson*, 45 F.Supp.2d 555 (S.D.Tex. 1999). On February 25, 1999, the Fifth Circuit affirmed the district court's dismissal, denied Graham authorization to file a successive petition, and denied a motion to recall the mandate regarding Graham's third federal petition. *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999). On March 23, 1999, a motion for rehearing was denied. Graham's petition for writ of certiorari followed. An execution date has not been set to date.

B. Statement of Facts

Guilt-Innocence Phase

During Graham's 1981 trial, Wilma Amos testified that she arrived at a Safeway grocery store, located at 8945 North Freeway, in Houston, Harris County, Texas, at approximately 9:21 p.m. on May 13, 1981. 14 SR 159-160. While inside the grocery store, Amos spoke with a man whom she later identified as the victim, Bobby Lambert. 14 SR 160-162. Amos talked to Lambert about the price of gloves as Lambert was selecting a pair of gloves. 14 SR 160-163. Amos also saw a man, wearing dark pants and a white jacket, who was walking slowly and looking at Lambert. 14 SR 163-164, 178. As Amos stood in the check-out line, she saw that man leave the store. 14 SR 163-164. Amos left the line to get another item, and when she returned, Lambert had left the store carrying a grocery bag.

14 SR165-166.

After leaving the grocery store, Amos went to her van in the parking lot and heard someone blow a car horn. 14 SR 168-69. Amos noticed two people, Lambert and the other man she had seen earlier, "tusseling." 14 SR 169-171. Amos stood in front of her van and watched the other man shoot Lambert and then run toward the back of the store. 14 SR 172-173. Amos could not remember the shooter's physical features to identify him, and testified that after the shooting she returned home and drank "half a fifth [of vodka]" to "get [her] nerves together." 14 SR 172-173, 175. Amos was also taking Valium during May 1981. 14 SR 174.

Daniel Grady testified that he arrived at the Safeway store between 9:30 p.m. and 10:00 p.m. and remained in his 1972 Oldsmobile, parked in front of the door, while his wife went inside the store. 14 SR 193-95. Grady testified that he could see faces, people, and objects in the parking lot. 14 SR 197. Grady saw a man later identified as Lambert exit the store carrying a bag of groceries. 14 SR 197, 212-13. As Lambert walked in front of Grady's car, a man, wearing dark pants and a white jacket, bumped into Lambert. 14 SR 197-200. As the man reached around to Lambert's back pocket for his wallet, Lambert dropped his groceries and tried to get away from the man. 14 SR 201-02. The attacker then drew a pistol, his arms fully extended, and shot Lambert. 14 SR 204-07. Lambert had nothing in his hands after he dropped his groceries. 14 SR 207-08. Grady dropped to the floorboard of his car when he heard the shot and crawled toward the other car door to let himself out. 14 SR 209. When Grady got out of the car, he saw the shooter running across the parking lot. 14 SR 209-12. Lambert propped himself up on the hood of Grady's car, then began walking toward the store. 14 SR 210-12. Just before Lambert collapsed in the doorway, Grady came to his assistance and Lambert subsequently died in Grady's arms. 14 SR 212-

14. Although Grady saw the shooter's face, he did not think he could identify him. 14 SR 209.

Bernadine Skillern testified that she arrived at the Safeway at about 9:30 p.m. with her three children. 14 SR 233-34. After she dropped her oldest daughter off at the store's entrance, she circled the lot then parked under a double lamp. 14 SR 235. She stayed in her car with her other two children who were attempting to sleep in the back seat. 14 SR 235-36. Skillern watched Lambert walk alone out of the grocery store carrying a grocery sack. 15 SR 236-37. The parking lot was well-lit; she could see and recognize people. 15 SR 240.

Skillern watched a man, dressed in dark pants and a white jacket, approach Lambert from the rear. 15 SR 322-23. Skillern identified Graham as the man who approached Lambert. 15 SR 331, 352-53. Skillern testified that Graham approached Lambert from behind at an angle and touched Lambert's pants pocket. 15 SR 323-26. Lambert then turned to face Graham. 15 SR 326-27. Graham grabbed Lambert by the neck and held a gun to Lambert's head. 15 SR 327-29. Skillern honked her car horn and Graham turned and looked directly at her. 15 SR 330-31. Then, standing with his arms fully extended, Graham shot Lambert. 15 SR 332-33. Lambert fell against Grady's car, then slid off onto the ground. 15 SR 332. Skillern then started her car, turned on her lights, and followed Graham as he walked quickly to the cross street. 15 SR 336-38. Then, Graham hesitated, looked back at Skillern, and began to run. 15 SR 337-38. Skillern quit following Graham because her children were screaming. 15 SR 341.

Meschell Gilliam testified that she was working as a checker at the Safeway store on the night of the offense and that Lambert bought twenty dollars worth of groceries with a hundred dollar bill. 14 SR 57-59. When J. W. Ellis, Houston Police Department Detective, looked in Lambert's pockets at the scene of the offense, he found sixty one-hundred dollar

bills and miscellaneous coins. 14 SR 78-79.

The medical examiner conducted an autopsy of Lambert on May 14, 1981, and recovered a bullet consistent with a .22 caliber gun. 15 SR 397-98, 403. Lambert died from a gunshot wound to the chest. 15 SR 403, 405. The absence of soot around the wound indicated that the shooter had held the gun at least eighteen inches from the entry of the wound. 15 SR 404.

Punishment Phase

Linda Jennings testified that on May 14, 1981, she and her friend Karen drove to a car wash about 9:15 p.m. to wash a Cadillac that she had borrowed from George O'Bear to use for her high school prom. 17 SR 95-97. After the girls pulled into one of the brightly lit car wash stalls, Graham pulled his car in behind their car. 17 SR 98-99. Graham spoke to Karen as Jennings washed the car. 17 SR 100. As Jennings finished washing her car, Graham got in her borrowed car on the driver's side; Karen was already sitting in the passenger seat by that time. 17 SR 102-04. Graham offered to give Jennings a check for $9,000 for the car, but Jennings asked Graham to get out of the car. 17 SR 104-06. Instead of getting out of the car, Graham started the car. 17 SR 106. When Jennings again asked Graham to get out of the car, Graham pulled a gun from his briefcase, put it in Karen's face, and told her to "get out, bitch." 17 SR 106-07. After Karen ran from the car, Graham pointed the gun at Jennings' chest and told her to move. 17 SR 108. Graham then drove away in Jennings' borrowed Cadillac with Jennings' purse still in the car. 17 SR 110.

On May 14, 1981, at approximately 10:00 p.m., Greg Jones was sitting in his van in the parking lot of a Stop-and-Go waiting for a friend to buy cigarettes. 17 SR 296-97. Graham came out of the store, approached Jones' friend, and began talking to him. 17 SR 299. As Jones' friend entered the store, Graham approached Jones' van, asking him if he

wanted to buy some marijuana 17 SR 300. After Jones told Graham he had no money, Graham asked Jones if he wanted to smoke some marijuana with him. 17 SR 300. After Jones' friend returned from the store, Graham and another male got in the van with Jones and his friend to smoke some marijuana. 17 SR 300-02. Jones moved the van further from the store, and all four smoked one marijuana cigarette. 17 SR 303. Afterwards, Graham pulled out a gun, stuck the gun to Jones' head, smiled, and said "I'm just a hustler." 17 SR 304. With the .38 cocked, Graham said that he wanted it all and took Jones' wallet and watch. 17 SR 305. Graham then hit Jones in the mouth with the gun about five times. 17 SR 307-08. The gun fired and wounded Jones in the neck. 17 SR. 308. Jones and his friend jumped from the van and ran to the store. 17 SR 309. Graham and the other male drove away in Jones' van. 17 SR. 309.

On May 15, 1981, at approximately 4:40 p.m., Graham approached Yale Salsgiver, who was in his green Ford van, and asked for directions to North Shepherd then for a ride to a Jack-in-the-Box on North Shepherd to see a friend. 18 SR 463-66. Salsgiver agreed to give Graham a ride and Graham entered the van with a small bag. 18 SR 466. After they arrived at a Jack-in-the-Box on North Shepherd, Graham told Salsgiver that it was the wrong one. 18 SR 467. Salsgiver continued driving at Graham's direction until he stopped at a parking lot. 18 SR 467-68. Graham then pulled a sawed-off shotgun, in two pieces, from his bag. 18 SR 469-70. Salsgiver grabbed the barrel of the shotgun, got out of the van, and tried to pull Graham from the van. 18 SR 470-71. Graham, who now sat in the driver's seat, started to drive away in Salsgiver's van as Salsgiver tried to hit Graham with the barrel of the shotgun. 18 SR 471. Graham grabbed the barrel of the shotgun from Salsgiver, backed up the van, and hit Salsgiver with the van knocking him to the ground. 18 SR 471-72. Graham then drove away in Salsgiver's van. 18 SR 472.

On May 15, 1981, at approximately 6:30 p.m., Graham stepped out of a green van, yelled at Emory Dedman, and then walked over to Dedman's car as Dedman began to drive out of his parking space at his place of employment. 17 SR 74-76. Dedman stopped his car and lowered his window. 17 SR 77. Graham asked Dedman for directions to North Shepherd. 17 SR 78. As Dedman again began to drive away, Graham again yelled; Dedman stopped and Graham asked for a jump for his car battery. 17 SR 78-79. After Dedman drove his car, a silver Cadillac Seville, license plate number VEW-446, over to the van, he asked Graham for a screwdriver to open the battery caps. 17 SR 79-80. After Graham walked to the back of the van and returned, he said "mother fucker, come over here." 17 SR 80. Graham then pulled a paper away revealing a shotgun which he pointed at Dedman's stomach from a distance of about three or four feet. 17 SR 80-81. Graham forced Dedman into his van and took his wallet, cash, watch, office keys, and car keys while threatening to "blow [Dedman] away." 17 SR 82-87. Graham threw Dedman's office keys to the back of the van and told him to stay on the floor of the van for ten minutes, or he would come back and blow his head off. 17 SR 87-88. Graham then drove away in Dedman's Cadillac. 17 SR 88.

On May 15, 1981, Richard Carter had parked in the well-lighted parking garage of the Aquarium Club at about 8:30 or 8:35 p.m. when Graham drove up in a silver Cadillac, license plate number VEW-446. 17 SR 264-67. Graham backed the Cadillac into a space so close to Carter's car that Carter could not get out of the car. 17 SR 267. After Carter told Graham that he could not get out of his car, Graham moved the Cadillac so that Carter could get out of his car. 17 SR 268-69. After Carter got out of the car, he and Graham talked for about ten or fifteen minutes. 17 SR 269-70. As Carter began walking away, Graham called Carter back to Graham's car and asked Carter if he knew directions to an address on South

Post Oak. 17 SR 271. Carter gave Graham directions while Graham sat in his car smoking marijuana. 17 SR 271-72. Graham asked Carter if he wanted to smoke. 17 SR 272. When Carter refused, Graham offered to sell Carter a pound of marijuana out of his trunk for fifty dollars. 17 SR 272.

Carter walked to the trunk of the car and Graham "popped" the trunk so that it would open. 17 SR 273. Graham then got out of the car carrying a sawed-off shotgun with the hammer pulled back, telling Carter to "get [his] white ass down behind the car." 17 SR 273-74. Graham told Carter that he was going to "shoot [his] fucking head off." 17 SR 274. Graham then forced Carter to give him his wallet and car keys, poking Carter in the head with the shotgun when he hesitated. 17 SR 276-78. Graham then opened Carter's car trunk, removed Carter's toolbox, and placed it in the trunk of the Cadillac. 17 SR 281-83. When Graham saw Carter looking at the license plate of the Cadillac, Graham told Carter to get his eyes off the license plate or he was going "to shoot [his] fucking brains out." 17 SR 283. Graham then told Carter that he had been a "good little white boy" and asked him if he wanted to keep his car. 17 SR 283. Graham threw Carter's car keys to the parking level below and walked over to the Cadillac. 17 SR 284-85. Before he left, Graham returned and removed Carter's cowboy hat from Carter's head and put it on his own head. 17 SR 285-86. After Graham drove away in the Cadillac, Carter turned around and saw that Graham had stopped halfway down the ramp and placed Carter's hat on a parked car. 17 SR 286. When Graham saw Carter watching him, Graham said that since Carter was not "a good little white boy," he could not have his hat back. 17 SR 286. Graham then took the hat and drove away. 17 SR 286.

Carter entered the club where he informed police of the incident. 17 SR 287. Carter stayed in the club until midnight or 1:00 a.m. when he left with a girl and walked her to her

car in the parking garage. 17 SR 287-88. As Carter and the girl stood by the car kissing, Carter saw somebody emerge from the front of the car and someone from the back of the car. 17 SR 288-89. Carter then realized that Graham was approaching them from the back of the car. 17 SR 289-90. Carter told the girl that Graham had robbed him earlier. 17 SR 290. The girl ran away screaming, and Carter turned around. 17 SR 291. When Carter turned around he saw that Graham was wearing Carter's cowboy hat and carrying a shotgun in his pants. 17 SR 291. When Graham saw Carter, Graham's eyes widened and his mouth dropped open. 17 SR 291. Graham started to back up, pulling his shotgun from his pants, and calling Carter a "rotten motherfucker." 17 SR 291-92. Graham jammed the shotgun in Carter's stomach, and Carter told him that he had already taken it all. 17 SR 292. Graham and the other male ran away as people and police arrived from the club. 17 SR 292.

On May 18, 1981, at approximately 2:30 p.m., Mohsen Nematolli was drinking beer in the parking lot of the Marriott Hotel with his friends, Linda and Rocky, after getting off work at the hotel. 18 SR 445-47. Graham approached them and asked Nematolli if he wanted to buy Graham's belt buckle for fifty dollars. 18 SR 448-49. Nematolli refused, then got in the car with his friends. 18 SR 450. As he was changing his shirt in the back seat of the car, Nematolli heard Graham say "you son of a bitch, motherfucker, give me your shit." 18 SR 450-51. When Nematolli told Graham, who was almost inside the car, to get out of the car, Graham hit Nematolli in the head with a gun, cocked the gun, and placed it in Nematolli's mouth. 18 SR 451-53. Graham asked Nematolli for his watch, ring, and wallet, then told him to get out of the car. 18 SR 454. Nematolli got out of the car, and saw another man in the passenger seat of a nearby car pointing a shotgun at Rocky's car. 18 SR 455. Graham searched Nematolli for more money, while holding the gun in his ribs, and then told him to get back in the car. 18 SR 456. Graham then ordered Linda out of the car, touched

her breasts, and took her wedding ring and money. 18 SR 457-59. Graham then told Linda to get back in the car, and told Rocky to start the car, turn his face away, and back up the car. 18 SR 459-60. Graham and his companion exited the parking lot in the opposite direction. 18 SR 461.

On May 18, 1981, Ernest Doakes was attending a high school graduation party with a friend Charles Gill. 17 SR 247-48. At about 11:00 p.m., he and Gill went to the Embassy Apartments on North MacGregor to drop off some items. 17 SR 248. While Doakes waited in the car for Gill, Graham and another male parked next to Doakes' car. 17 SR 249-51. Graham walked to the passenger side of the car, opened the door so that the inside light illuminated the car, pointed a pistol at Doakes' ribs, and told him to move over. 17 SR 251. Graham then got in the car with Doakes, while Graham's companion got in the car on the other side, sandwiching Doakes between the two of them. 17 SR 252-54. As Graham's companion started the car and began driving away, Graham, continuing to point a gun at Doakes, took Doakes' wallet. 17 SR 253-55. When Doakes asked them to just take the car and let him out, the other male told Doakes to shut up or they would "kill his ass anyway." 17 SR 255. After driving a couple of blocks, they stopped the car and told Doakes to get out. 17 SR 257. Doakes got out of the car, then Graham moved over to the driver's seat and drove away in the 1979 Mercury Marquis. 17 SR 257.

On May 19, 1981, at approximately 6:15 p.m., Richard Sanford was walking toward his car in a parking garage when Graham approached him and asked him directions to either North or South Shepherd. 17 SR 225-29. Sanford gave Graham directions, but as Sanford was getting in his car, Graham pointed a gun at Sanford's stomach and told him to "get in the car, motherfucker." 17 SR 229-31. Graham got in the driver's side of the car with Sanford and threatened to shoot him if he caused trouble. 17 SR 232. Graham demanded

Sanford's wallet and asked Sanford how much money he had in the wallet. 17 SR 232-33. When Sanford answered forty-nine dollars, Graham threatened to kill Sanford if he had lied. 17 SR 234. Graham took Sanford's ring and watch, then told Sanford that he had killed six people already and that he would kill Sanford if he did something stupid. 17 SR 235-37. Graham rifled through Sanford's briefcase in the back seat and looked in Sanford's car trunk. 17 SR 237. Graham got back in the car and started it, cocking the gun and pointing it at Sanford's stomach. 17 SR 239. Graham then drove to a stairwell, ordered Sanford into the stairwell, and followed him into the stairwell where he searched Sanford's pockets and coat. 17 SR 239-41. Graham pointed the gun at Sanford's stomach and ordered him back in the car. 17 SR 241-42. He told Sanford to lie face down in the back seat and wait there for five minutes, or his "partner" would shoot him. 17 SR 242-43.

On May 29, 1981, at approximately 2:30 or 3:00 a.m., Lisa Blackburn, a fifty-seven year old cab driver, was pumping gas at a gas station when Graham approached her and asked if she needed help. 18 SR 381-83. After Blackburn finished pumping gas, Graham told her his car had broken down and asked if she would drive him to the Tidwell Exit. 18 SR 383-84. Graham sat in the front seat of the cab and did not move even after Blackburn asked him to sit in the back seat. 18 SR 348-85. Blackburn drove Graham to Tidwell, where he then directed her to an apartment building parking lot. 18 SR 385-86. When the cab stopped, Graham opened the door, put his hand over his sock, pulled out a gun, and pointed it at Blackburn. 18 SR 386. Graham informed Blackburn that he would take her money, then ordered her to back her car into a carport. 18 SR 387-89. Graham rummaged through the glove compartment of the car then ordered Blackburn to "get out." 18 SR 389. After directing Blackburn to the trunk of the car, Graham rummaged through the trunk compartment where he found Blackburn's .38 caliber gun which he then trained on

Blackburn after putting his own gun in his belt. 18 SR 389-91.

Graham, who seemed displeased that Blackburn was carrying only fifteen dollars, told Blackburn that he needed six hundred dollars. 18 SR 392. Graham then told Blackburn that he thought he was "going to make it" with her. 18 SR 392. When she replied that she was "too old for that," Graham struck her in the face and said "don't lie." 18 SR 392. Graham and Blackburn got back in the car, and Graham, while holding a gun on Blackburn, drove to a vacant apartment. 18 SR 393. Graham entered the apartment by sticking his hand in a broken window by the door and opening the door. 18 SR 394-95.

Inside the apartment, Graham turned on the lights, and told Blackburn to take off her clothes and get against the wall. 18 SR 396-97. After Blackburn removed her clothes, Graham touched her vaginal area "like an examination" and told her to sit down. 18 SR 398-99. He threatened to "fuck her...in the ears and the eyes and everyplace else." 18 SR 399-400. Blackburn testified that Graham then did all of the things that he said he was going to do. 18 SR 400. While Graham lay on top of Blackburn, he held the gun directly over her head. 18 SR 401-02. Graham forced Blackburn's legs as far over her head as they would go and had sexual intercourse with her. 18 SR 401-02. When Blackburn screamed, Graham forced her to turn over and unsuccessfully attempted anal intercourse with her. 18 SR 402. Blackburn, who feared that Graham would kill her in the vacant apartment where no one would find her body, then informed Graham that she lived in a warm and comfortable apartment where she might find more money for him. 18 SR 403. Graham agreed to go to Blackburn's apartment but told her that if anyone were at her apartment, he would kill them both. 18 SR 404.

After Graham and Blackburn arrived at her apartment, Graham searched through Blackburn's closets and belongings for money. 18 SR 408. He told her not to move because

he did not have anything to lose and, though he did not plan on getting caught, knew he would burn if he did. 18 SR 408. Graham stole jewelry and anything he found of value, placing it on the landing at the top of the stairs. 18 SR 408-09. After about an hour and a half, Blackburn noticed a change in Graham's balance and movements. 18 SR 410-12. Graham told her that they were going to finish what they started and ordered her to undress. 18 SR 412-13. Blackburn asked Graham to undress first; Graham did and got in bed with the gun. 18 SR 413. Graham told Blackburn to "suck" him and again ordered her to undress. 18 SR 413. However, as Blackburn began to undress, she realized that Graham was falling asleep, so she waited for awhile then took the gun, his clothes, and the money he had taken from her. 18 SR 413-15. She thought about killing Graham. 18 SR 415. After Blackburn decided not to kill Graham, she left her apartment and locked Graham inside. 18 SR 415. She asked the apartment management to telephone the police. 18 SR 416. Blackburn waited outside her door for the police who subsequently arrested the naked Graham after awakening him in Blackburn's bed. 18 SR 416-17, 428-29. At the time of his arrest, Graham's billfold contained an Exxon credit card with the name Richard B. Sanford on it. 18 SR 431-32.[4]

Cathy Thornton, an employee at the Texas Youth Council, testified that she knew Graham and was familiar with Graham's reputation in the community in which he lives and among those people with whom he resides. 18 SR 442-43. Graham's reputation was bad. 18 SR 443.[5]

Graham then presented the testimony of his stepfather who testified that Graham lived

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[4] All of the witnesses, with the exception of Blackburn who was present at his arrest, positively identified Graham from lineups after his arrest.

[5] On January 6, 1982, after the instant trial, Graham entered pleas of guilty to ten counts of aggravated robbery and was sentenced to twenty-year concurrent prison terms for offenses committed on May 14, 15, 16, 18, 19, and 20, 1981.

with his father, that he visited his mother once or twice a week, that Graham was nice to him, and that Graham would do what he was asked to do, such as mowing the yard, cleaning, and helping his mother. 18 SR 475-77. Graham was fifteen when he first met his stepfather. 18 SR 477. Graham was not violent, never fought with his stepfather, and was respectful of his mother, who was on medication for a nervous condition, and cared for her. 18 SR 478. Graham had three brothers, and two children ages four and two whom he tried to provide with money or clothing. 18 SR 478-79.

Graham's grandmother testified that he stayed with her at times. 18 SR 481. Graham was about three years old when he first stayed with her because his mother had a nervous condition and mental illness and goes to the hospital "now ever since then." 18 SR 481-82. She kept Graham occasionally until he was nine, ten, or eleven. 18 SR 482. Graham would stay with his mother when she was released from the hospital, but she had been in the hospital about twenty times. 18 SR 483. Graham's father took Graham to live with him when Graham was about eleven or twelve, and he had lived with his father ever since. 18 SR 484. Graham would attend church when he lived with his grandmother because he loved the Lord. 18 SR 485. Graham attended school, never gave her any problems, and was never violent. 18 SR 485-86. She also had never known Graham to have weapons around him. 18 SR 486.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. Graham fails to advance a compelling reason for this Court to review his case, and

none exists.

In March 1993, Graham's first federal habeas petition, which had been filed in 1988 ("the 1988 petition"), was litigated to finality on the merits. Claims rejected during the litigation of that petition included claims of ineffective assistance of trial counsel for failure to investigate alibi witnesses. Graham's next two federal habeas petitions were dismissed without a merits review; one being voluntarily dismissed by Graham shortly after it was filed, and the other, which had been filed in July 1993 ("the 1993 petition"), being dismissed for failure to exhaust state remedies in 1996.[6] Thereafter, Graham took no further action in state or federal court for more than one and a half years, eventually filing a fourth federal habeas petition in 1998 ("the 1998 petition"). The 1998 petition chiefly contained claims of ineffective assistance of trial counsel. The lower court found that the 1998 petition was barred by 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA").

Recent decisions of this Court compel one conclusion to Graham's perpetual filing of federal habeas corpus petitions – it must come to an end. To be sure, Graham conceded in the lower court that the 1998 petition was successive in relation to the 1988 petition. But, even if Graham somehow escapes the successive petition bar, his failure to act for more than one and a half years after his 1993 petition was dismissed, which all occurred after the enactment of the AEDPA, renders his 1998 petition indefensibly time barred under 28 U.S.C. § 2244(d), as amended by the AEDPA. For these reasons, this Court should decline to exercise its certiorari jurisdiction to review Graham's claims.

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[6] The 1993 petition was essentially an attempt to relitigate previously rejected claims of ineffective assistance of counsel with additional evidentiary material.

II. THE LOWER COURT CORRECTLY HELD THAT GRAHAM'S FOURTH FEDERAL PETITION WAS BARRED BY THE AEDPA.

A. Graham's fourth habeas petition is not a continuation of his first habeas petition.

Graham first contends that the lower court's application of the AEDPA's successive petition bar, 28 U.S.C. § 2244(b), conflicts with this Court's opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). In *Martinez-Villareal*, the petitioner's first three federal petitions were dismissed for failure to exhaust state court remedies. The petitioner's fourth federal petition was litigated to finality on all but a claim of whether the petitioner was competent to be executed ("the *Ford*[7] claim"). The *Ford* claim was dismissed from the litigation as "premature" because an execution date had not been set. Subsequently, an execution date was set, and petitioner filed a new federal petition ("the fifth petition") raising the *Ford* claim.

The Court held that the fifth petition should not be treated as a "second or successive application" under 28 U.S.C. § 2244(b) because the petitioner did not "receive an adjudication of his claim" in his *initial* proceeding which was litigated to finality on the merits. *Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1620. The Court stated that "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* The Court noted, however:

> This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive

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[7] *Ford v. Wainwright*, 477 U.S. 399 (1986).

habeas corpus application" within the meaning of AEDPA.

Martinez-Villareal, 523 U.S. at __ n. __, 118 S.Ct. at 1622 n. __.

Here, Graham utterly fails to appreciate the different procedural posture of his case than that present in *Martinez-Villareal*. Most importantly, Graham ignores that his 1988 petition was litigated to finality on the merits, and no claim therein was dismissed as premature or for failure to exhaust state court remedies or for any other "technical procedural reason." Thus, as the lower court correctly found, it is not that Graham's 1998 petition is a "second or successive application" in relation to the 1993 petition, but that the 1998 petition is a "second or successive application" in relation to the 1988 petition. *Graham*, 168 F.3d at 773 n.7, 786; *see Mancuso v. Herbert*, 166 F.3d 97, 101 & n.3 (2nd Cir.) (petitioner's fifth petition was a "second or successive application" application in relation to petitioner's third petition, which had been rejected on the merits, not in relation to petitioner's fourth petition, which had been dismissed for failure to exhaust state court remedies), *cert. denied*, __ U.S. __, 119 S.Ct. 2376 (1999).

Further, Graham's contention that the Court did not apply the AEDPA to the fifth petition in *Martinez-Villareal* because it was merely a continuation of the fourth petition is simply wrong. In *Martinez-Villareal*, the Court applied the AEDPA to the fifth petition but held that the fifth petition was not second or successive in relation to the sole prior petition which had been litigated to (partial) finality on the merits, the fourth petition. Obviously, if the fifth petition was merely a continuation of the fourth petition and, therefore, the AEDPA did not apply at all, the Court would not have considered, in any manner, whether the fifth petition was a successive petition under the AEDPA. Again, the lower court here did not find that Graham's 1998 petition was second or successive in relation to his petition which had not been litigated to finality on the merits, the 1993 petition, but to his petition

which had been litigated to finality on the merits, the 1988 petition.

Finally, Graham conceded in the lower court that all claims, and the related evidentiary support, he sought to litigate in the 1993 and 1998 petitions could have been raised in the 1988 petition, and that his 1998 petition was second or successive in relation to his 1988 petition. *See Graham*, 168 F.3d at 773-74, 789-90.[8] In sum, that Graham elected to perpetually evolve his claims of ineffective assistance of trial counsel after they had been rejected during the litigation of his 1988 petition does not permit him to come under the ambit of *Martinez-Villareal* by any measure, much less to litigate whatever issues he desires *ad infinitum*.[9]

B. Applying the successive petition bar of the AEDPA to Graham's fourth habeas petition does not offend retroactivity principles.

Graham next argues that applying the AEDPA to his successive 1998 petition violates retroactivity principles of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under *Landgraf*:

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[8] Graham has consistently acknowledged, to the lower court and to this Court, that he cannot satisfy the AEDPA's "cause" requirement for a successive petition, 28 U.S.C. § 2244(b)(2)(B)(i). However, the lower court misquoted one sentence of Graham's Motion for Order Authorizing District Court to Consider Successive Habeas Petition on page 14. *See Graham*, 168 F.3d at 789. The sentence at issue should read: ". . . . . This report was obtained through a state open records act request that could as readily have been made in connection with the first habeas proceeding *in 1988 as it was in connection with [sic] second habeas proceeding in 1993. . . .*" (emphasis in corrected portion of quote). Thus, although Graham's present habeas counsel may not have gained access to this report until 1993, *see* Petition for Writ of Certiorari at 11, Graham conceded that he could have gained access to the evidence in 1988.

[9] It should be noted that, unlike claims readily discoverable and ripe for a determination at the time of an initial petition, the peculiar nature of a *Ford* claim, arising solely with a pending execution date, factored into the Court's decision in *Martinez-Villareal*. *See Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1622.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280.

This Court recently held that "the statute [the AEDPA] reveals Congress's intent to apply the amendments to chapter 153 [which include 28 U.S.C. § 2244] only to such cases as were filed after the statute's enactment." *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). There can be doubt here that Graham's 1998 petition was filed after the AEDPA's enactment, and, therefore, the AEDPA applies, including the successive petition bar of 28 U.S.C. § 2244(b). *See Felker v. Turpin*, 518 U.S. 651 (1996) (applying successive petition bar of 28 U.S.C. § 2244(b) to petition filed after enactment of the AEDPA where pre-AEDPA petition had been previously rejected).[10]

Further, if this Court's prior announcement and application of Congress's intent regarding the AEDPA (*Lindh* and *Felker*, respectively) is somehow unclear, the lower court reasonably found that applying the AEDPA in this case was not impermissibly retroactive. *See Graham*, 168 F.3d at 783-87. By its very nature, a federal habeas corpus proceeding concerns secondary, rather than primary conduct, and acts prospectively. When coupled with the procedural nature of the successive petition statute at issue, it is clear that Graham possessed no constitutionally recognizable interest in the pre-AEDPA standard for successive

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[10] This Court applied the AEDPA in *Felker*, notwithstanding the petitioner's allegation of innocence. *Felker*, 518 U.S. at 658.

petitions. *See Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."). Indeed, it is singularly absurd that state prisoners possess some type of inherent right to besiege the federal courts with successive habeas petitions under any particular standard. For example, in *McCleskey v. Zant*, 499 U.S. 467 (1991), consistent with its later decision in *Felker*, this Court announced new standards for the pre-AEDPA abuse of the writ doctrine and applied that to the petition before the Court. This claim is not worthy of certiorari review.

C. If Graham's fourth petition is not barred as a successive petition, it is time barred.

Even assuming Graham could escape the AEDPA's successive bar, 28 U.S.C. § 2244 (b), one thing is certain – he cannot escape the AEDPA's time limitation bar, 28 U.S.C. § 2244(d). The statute provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively

applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244. However, in cases where a petitioner's conviction became final before enactment of the AEDPA, like here, the circuit courts are in general agreement that those petitioners are entitled to a one-year "grace" period from the statute's effective date to file a federal habeas petition or otherwise toll the limitations period. *See, e.g., Gaskins v. Duval*, __ F.3d __, __, 1999 WL 447129, *1-2 (1st Cir. 1999); *Rosa v. Senkowski*, 148 F.3d 134, 135-36 (2nd Cir. 1998); *Lovasz v. Vaughn*, 134 F.3d 146, 149 (3rd Cir. 1998); *Brown v. Angelone*, 150 F.3d 370, 375-76 (4th Cir. 1998); *Kiser v. Johnson*, 163 F.3d 326, 327-28 (5th Cir. 1999); *Brown v. O'Dea*, __ F.3d __, __, 1999 WL 587209, *3-4(6th Cir. 1999); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Nichols v. Bowersox*, 172 F.3d 1068, 1073 (8th Cir. 1999); *Dictado v. Ducharme*, __ F.3d __, __, 1999 WL 646953, *1-3 (9th Cir. 1999); *Haney v. Addison*, 175 F.3d 1217, 1220-21 (10th Cir. 1999); *Wilcox v. Florida Dept. of Corrections*, 158 F.3d 1209, 1211 (11th Cir. 1998).

Applying these principles, Graham had one year from October 1996, at the most generous,[11] to pursue his claims in state or federal court under 28 U.S.C. § 2244(d), as

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[11] For purposes of Graham's petition, the Director will assume *arguendo* that the limitations period was tolled during the pendency of Graham's 1993 petition. It should also be noted that Graham's counsel of record before the Court was lead counsel during the

amended by the AEDPA. Yet, Graham, an allegedly innocent prisoner,[12] sat idle for more than one and a half years after the 1993 petition was finally dismissed by the district court in October 1996. Graham's failure to act in state or federal court within one year of October 1996 rendered the 1998 petition indefensibly time barred.

Finally, applying the time limitation bar of 28 U.S.C. § 2244(d) to Graham's 1998 petition does not implicate retroactivity concerns in any manner. As noted above, all conduct rendering the 1998 petition time barred arose solely after the statute's enactment. For these reasons, even if the Court were to agree with Graham that the successive petition bar of the AEDPA does not apply to him, this case is not worthy of certiorari review by the Court. *See Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1622 (noting that petitioner's fifth petition was brought in a "timely fashion").

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pendency of Graham's appeal of the 1993 petition in the lower court.

[12] For the reasons set out at length in the Director's brief to the lower court, the Director disputes Graham's assertions of innocence and that the 1998 petition would have been considered under pre-AEDPA standards. Pointedly, when Graham finally returned to the state courts in 1998 to present his "new evidence," the Court of Criminal Appeals determined that he failed to satisfy the threshold showing of innocence required to file a successive state habeas application under TEX. CODE CRIM. PROC. art 11.071 § 5(a)(2) ("by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt."). *See Ex parte Graham*, No. 17,568-05, November 18, 1998, Order & Judge Baird concurring opinion (Appendix 6 to Graham's petition for writ of certiorari). The implied and express factual findings which flow from the Court of Criminal Appeals' order are presumptively correct. *See Marshall v. Lonberger*, 459 U.S. 422, 433-35, (1983) (implied and express factual findings and credibility choices made by the state court judges may not be redetermined by a reviewing federal court). Similarly, the federal district court has rejected Graham's claim of innocence. *See Graham*, 829 F.Supp. at 207 ("The Court determines that Graham has not met the 'extraordinarily high' threshold showing of actual innocence.").

III. THE LOWER COURT PROPERLY REFUSED TO RECALL ITS PRIOR MANDATE.

A. Graham's motion to recall the prior mandate was subject to the AEDPA.

In addition to finding the 1998 petition barred by 28 U.S.C. § 2244(b), as amended by the AEDPA, the lower court denied Graham's motion to recall the mandate of the 1993 petition. According to Graham, the lower court should have applied a miscarriage of justice standard to his motion, rather than the successive petition bar of the AEDPA.

The Court recently identified the two forms of recalling a prior mandate in a § 2254 case: (1) an appellate court *sua sponte* recalling its prior mandate; and (2) a petitioner moving the court to recall its prior mandate. *Calderon v. Thompson*, __ U.S. __, __, 118 S.Ct. 1489, 1500 (1998). In the case of a *sua sponte* recall of a prior mandate, the appellate court must only act to avoid a miscarriage of justice. *Thompson*, __ U.S. at __, 118 S.Ct. at 1502. However, the successive petition bar of the AEDPA, 28 U.S.C. § 2244(b), may nevertheless apply to the reopened cause. *Thompson*, __ U.S. at __, 118 S.Ct. at 1500.

In contrast, the successive petition bar of the AEDPA, 28 U.S.C. § 2244(b), applies when a petitioner moves the court to recall its prior mandate:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id.

Here, it is beyond cavil that the lower court correctly characterized Graham's motion

to recall the mandate as a second or successive petition, and, based on Graham's admission, correctly concluded that the matter was barred pursuant to the AEDPA. *Graham*, 168 F.3d at 788-90. Graham's claim that the lower court's decision automatically renders *any* motion to recall a prior mandate filed by a petitioner to be rejected simply because the motion was made is absurd. Consistent with *Thompson*, the lower court said no more than that such a motion would have to satisfy the AEDPA standards. Moreover, as noted *supra*, even if Graham can avoid the AEDPA successive petition standards, he entirely fails to circumvent the AEDPA time limitation standards by his failure to act for more than one and a half years after his 1993 petition was dismissed. This claim is not worthy of certiorari review.

B. The denial of Graham's motion to recall the prior mandate did not deprive Graham of due process.

Graham next contends that the lower court's refusal to recall its prior mandate deprived him of due process because the delays in his case are entirely attributable to the courts, not him. However, for whatever reasons he now seeks to excuse his actions, it must be remembered that Graham has consistently acknowledged that all present claims, and the attendant evidentiary support, were available to Graham more than eleven years ago when he filed his first federal petition, the 1988 petition. It must also be remembered that, even after Graham's first petition was denied on the merits, he filed his 1993 petition in federal court with knowledge that all claims and evidence had not previously been presented to the state courts rendering the petition subject to dismissal for failure to exhaust state remedies. Finally, and most significantly, it must be remembered that even after the 1993 unexhausted petition was dismissed in 1996, Graham waited more than one and a half years to raise his claims, which were available in 1988, to the state or federal courts. In sum, Graham's attempt to now lay blame on the courts for any delay is utterly disingenuous.

Finally, although the claim has been rejected by the state and federal courts, *see* footnote 12, Graham has an available avenue to pursue his claim of alleged innocence through the state clemency process. For example, the petitioner in *Lucas v. Johnson*, 132 F.3d 1069 (5th Cir.), *cert. dismissed*, __ U.S. __ (1998), obtained executive clemency on claims of actual innocence through the same avenue available to Graham.

CONCLUSION

For the foregoing reasons, the Director respectfully requests this Court to deny Graham's petition for writ of certiorari.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

SHANE PHELPS
Deputy Attorney General
for Criminal Justice

GENA BUNN
Assistant Attorney General
Chief, Capital Litigation Division

TOMMY L. SKAGGS*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1429
(512) 320-8132 (Fax)

ATTORNEYS FOR RESPONDENT

*Counsel of Record

(3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GARY GRAHAM, now known as SHAKA SANKOFA,
Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF FOUR INNOCENT FORMER DEATH ROW INMATES AND THE NATIONAL CENTER ON WRONGFUL CONVICTIONS AND THE DEATH PENALTY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ERIC M. FREEDMAN
Hofstra University School of Law
(Counsel of Record)
Hempstead, New York 11550
(516) 463-5167

LAWRENCE C. MARSHALL
Northwestern University Legal Clinic
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

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INTEREST OF AMICI

The *amici* supporting the grant of certiorari in this case are four ordinary citizens who were wrongly convicted of murder and sentenced to death. They are joined by the National Center on Wrongful Convictions and the Death Penalty, an institute of the Northwestern University School of Law and Northwestern Univeristy's Medill School of Journalism, devoted to documentation and education concerning the causes and cures of miscarriages of justice in capital cases.[1]

Amici believe that understanding the real-world obstacles that innocent death row inmates have faced in attempting to secure vindication through post-conviction proceedings is essential to comprehending the magnitude of the errors committed by the Court of Appeals.

The Fifth Circuit did not merely reach conclusions on the key legal issues that are squarely contrary to those of other Circuits. It came to a result that, unless reversed, threatens to close retrospectively and permanently the narrow gateway through which *amici* were able to struggle in order to prove their innocence. The decision below unfairly snatches from those who face execution notwithstanding strong evidence of innocence the protections carefully crafted by this Court to balance the claims of finality against the imperative need to avert fundamental miscarriages of justice. See *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995).

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[1]All parties have given their written consent to the filing of the brief, which have been filed with the Clerk of this Court. No counsel for either party authored this brief in whole or part, and no person or entity other than the *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Kirk Bloodsworth is a resident of Maryland. In 1984, he was wrongly convicted on the basis of several eye-witnesses of the murder, rape and first degree sexual offense of 9-year-old Dawn Hamilton, and sentenced to death. After these convictions were overturned because of the prosecution's failure to disclose investigative reports that implicated another suspect (see *Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986)), Mr. Bloodsworth was again tried and convicted for these crimes and given three consecutive life sentences. See *Bloodsworth v. State*, 543 A.2d 382 (Md. App. 1988). After spending almost nine years in prison, Mr. Bloodsworth was released after sophisticated DNA testing proved conclusively that he was innocent of the crime. See Paul Valentine, *Jailed for Murder, Freed by DNA*, WASH. POST, June 29, 1993, at A1.

Clarence Lee Brandley, an African-American resident of Texas, was wrongly convicted of capital murder and sentenced to death in January, 1981 (a few months before Graham's conviction there) for the death of sixteen-year-old Cheryl Ferguson, a white female. See *Brandley v. State*, 691 S.W.2d 699 (Tex. Cr. App. 1985). After years of investigation, Brandley's volunteer attorneys and investigators showed that the conviction resulted from the state prosecutors' suppression of material exculpatory facts, knowing presentation of false evidence, and the state investigators' use of physical threats and racially-biased investigative procedures. In 1989, Brandley's conviction was overturned and he was released from prison the following year. See *Ex Parte Brandley*, 781 S.W.2d 886 (Tex.Cr.App. 1989); Nick Davies, WHITE LIES: RAPE, MURDER AND JUSTICE TEXAS STYLE 399 (1991).

Joseph Green Brown is a resident of Maryland. In 1974, he was wrongly convicted of rape, robbery and capital murder and sentenced to death in Florida, principally on the basis of the testimony of one witness. See *Brown v. State*, 381 So. 2d 690 (Fla. 1980). After he had come within 13 hours of execution, he and his attorneys showed that his conviction was based largely upon

testimony that was known by the prosecutor to be false, and his conviction was vacated in federal habeas corpus. See *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). Mr. Brown was released from prison in 1987, having served almost fourteen years on Death Row. See Barry Siegel, *Sentencing the Wrong Man to Die*, , L.A. TIMES, May 10, 1987, at 1.

Walter McMillian is an African-American resident of Alabama. After a perfunctory two-day trial in 1988, he was wrongly convicted and sentenced to death for the murder of Rhonda Morrison, a white woman. As a result of four years of determined investigation by volunteer counsel, several new credible defense witnesses were located and the three essential state witnesses admitted that their trial testimony was false and had been procured by state investigators through previously undisclosed promises of lenient treatment and reward money. In 1993, Mr. McMillian was released from prison after state officials conceded his innocence. See *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993); Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1; Pete Earley, CIRCUMSTANTIAL EVIDENCE (Bantam 1995).

The National Center on Wrongful Convictions and the Death Penalty is an institute of the Northwestern University School of Law and Northwestern University's Medill School of Journalism. The Center has identified and documented 81 cases during the past 25 years in which persons who were once condemned to die have been exonerated and freed. The Center works with many of these former death row inmates to call attention to the significant risk of wrongful execution and to urge courts and legislators to ensure that meaningful opportunities for exoneration are made available to guard against the execution of the innocent.

Kirk Bloodsworth, Clarence Lee Brandley, Joseph Green Brown, Walter McMillian, and the National Center on Wrongful

Convictions and the Death Penalty are uniquely familiar with the barriers confronting a wrongly-convicted citizen on death row who attempts to demonstrate his or her innocence in post-conviction proceedings.

SUMMARY OF ARGUMENT

A capital defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). During the period of relevance here, however, the quality of legal representation provided to capital defendants was all too often deficient.

In this context, the Court developed a "miscarriage of justice" jurisprudence that enabled federal habeas corpus petitioners to gain relief from the errors of their lawyers by showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); accord *Schlup*, 513 U.S. at 326 (applying this standard to allow petitioner to pursue a successive petition attacking failure of his trial counsel to call witnesses to establish his innocence).

This body of law constituted the fundamental protection against execution of innocent defendants until, in *McFarland v. Scott*, 512 U.S. 849 (1994), added another significant protection by giving a robust reading to the statutory right to counsel for federal habeas corpus petitioners contained in 21 U.S.C. § 848(q)(4)(B).

At that point, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress sought to create a balance. On the one hand, it rejected a proposal to weaken Section 848. On the other hand, Congress imposed stringent new conditions on successive petitions, fundamentally

altering the structural mechanisms through which innocence was to be vindicated.

The decision below wrongly applies this latter change retroactively, to prisoners who were attempting to pursue their legal rights in an environment which often afforded no meaningful access to lawyers who would perform with "due diligence." In so holding, the Court of Appeals ignored the canons of statutory construction laid out by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) – principles that should have been applied to reject a retrospective application of the AEDPA. The Court of Appeals then compounded this error by adding the impossible condition (rejected by other Circuits) that the petitioner show he had relied upon prior law.

Although the evidence clearing some of the individual *amici* submitting this brief could have been found by diligent counsel at an early stage of the proceedings, it was not unearthed by their actual counsel until many years after trial. Fortunately, however, the *amici* had the benefits of a legal system that afforded them the opportunity to have their claims and evidence of innocence evaluated on their merits. Gary Graham deserves the same benefits.

ARGUMENT

I. UNDER THE PRE-AEDPA LEGAL FRAMEWORK, THE "MISCARRIAGE OF JUSTICE" DOCTRINE WAS CENTRAL TO VINDICATING THE CONSTITUTIONAL RIGHTS OF INNOCENT CAPITAL PRISONERS.

As the Petition for Certiorari lays out in detail (Pet. at 7-10), diligent trial counsel for Mr. Graham could – on the basis of information then available to be found – have so significantly undermined the government's case that a fully-informed jury

would have been most unlikely to return a conviction. But, like many of the *amici* and many of the 77 others who have been wrongly condemned, Mr. Graham did not have diligent trial counsel. This can happen, despite the best efforts of any system to ensure effective representation. In order to avoid visiting the possibly fatal consequences of such poor representation on innocent defendants, this Court crafted the doctrine of miscarriage of justice.

Prior to the passage of AEDPA, to be relieved by a federal habeas court of a procedural default committed at the state level, or to be permitted to file a successive federal petition (see *McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991)), the petitioner was required to show either:

> (a) "cause" for the default or failure to plead the claim earlier and "prejudice" from the constitutional violation, or
>
> (b) a fundamental miscarriage of justice, *viz.* that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496.

The first of these conditions frequently could not be satisfied, even when counsel had been ineffectual in investigating the client's case. As *Murray v. Carrier* held, attorney error is "cause" only when it amounts to "ineffectiveness" under *Strickland v. Washington*, 466 U.S. 668 (1984), a test that is often difficult to satisfy. See *Murray*, 477 U.S. at 487. See generally, Stephen Bright, *Death in Texas*, THE CHAMPION, July 1999 at 16.

Thus, the miscarriage of justice doctrine, elaborated in a series of cases by this Court (see *Schlup* 513 U.S. at 320-21), played an absolutely vital role in insuring that death row inmates with strong cases of innocence could obtain rulings on the merits of their constitutional claims.

This case illustrates the point. When the federal District Court dealt with Graham's second habeas petition in 1993, it ruled that his attack on the effectiveness of trial counsel was successive to a similar claim Graham had asserted in his 1988 federal petition. Nonetheless, the District Court considered Graham's petition on its merits because the court held that Graham arguably had made out a colorable showing of factual innocence. *Graham v. Collins*, 829 F. Supp. 204, 208 (S.D. Tex. 1993). Addressing the merits, the District Court concluded that counsel had not been ineffective. That was the issue before the Fifth Circuit when (notwithstanding the state's explicit waiver of an exhaustion defense, it suddenly and spontaneously decided to send him back to the Texas courts to exhaust the claim "without prejudice." *Graham v. Johnson*, 94 F.3d 958, 971 (5th Cir. 1996); see also *id.* at 966 & n.13.

At that moment, Graham -- because he had made a colorable showing of actual innocence -- was entitled to a review of the constitutional merits of his successor petition. The Fifth Circuit's ruling in 1999 wrongly deprived him of that entitlement.

II. IN MISCONSTRUING AEDPA TO APPLY TO THIS CASE, THE FIFTH CIRCUIT MISREAD THIS COURT'S GOVERNING PRECEDENT, CONGRESSIONAL INTENT, THE APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION, AND THE REQUIREMENTS OF JUSTICE.

In depriving Mr. Graham of his fully-matured right to a ruling on the merits of his claims, the Fifth Circuit first construed AEDPA to apply to this case, and then read the statute in a way that is not only legally unique, but uniquely unjust. Graham's counsel has already canvassed the many legal infirmities of that reading and the Circuit splits it creates (Questions 1-3). We confine ourselves to matters of special practical importance to innocent capital inmates.

A. The Fifth Circuit Flouted *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), in a Context that Most Urgently Calls for its Application

Ignoring the plain teachings of Chief Justice Rehnquist's opinion for seven members of the Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 1621 (1998), the Court of Appeals held that Graham's current petition was barred by the successive claim provision of AEDPA. The Court of Appeals reached this conclusion even though Graham's prior petition had been dismissed on exhaustion grounds. From *amici's* viewpoint, the critical similarity between Graham's case and *Martinez-Villareal* is not only in the law, but in the facts.

Martinez-Villareal took every possible step prior to AEDPA to press his claim, and was denied adjudication of his claim at that time only because the federal court determined that it would not hear the claim until after state court fact-finding to consider subsequent developments. See . *Martinez-Villareal*, 118 S. Ct. at 1620.[2] Similarly, Graham, beginning long before AEDPA came into force or was even contemplated, asserted his right to a disposition on the merits. Yet, even though he fulfilled the necessary legal requirements in 1993, Graham was blocked from having his case considered on its merits at that time simply because the Fifth Circuit spontaneously made a discretionary decision in 1996 to have further factfinding proceedings conducted in state rather than federal court.

When this Court examined Martinez-Villareal's situation, it held that his claim was not governed by AEDPA's bar on successive claims, writing:

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[2]Significantly, as in this case, the last federal court that ordered Martinez-Villareal to exhaust his claim in state court did so after AEDPA had come into effect.

> This may have been the second time that respondent had asked the federal courts to provide relief ... but this does not mean that there were two separate applications, the second of which was necessarily subject to [28 U.S.C.] § 2244 (b). ... Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Martinez-Villareal, 118 S.Ct. at 1621.

The same is true here. Graham "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." He did not receive that adjudication only because the Fifth Circuit has now subjected his petition to a legal regime that this Court has already held should not apply to cases in the posture of Graham's.

In fact, if there is any distinction between Graham's case and *Martinez-Villareal*, it is one that favors Graham. There was no link between Martinez-Villareal's unadjudicated claim (mental competency to be executed) and factual innocence, but the effect of this Court's ruling that AEDPA was inapplicable was to enable him to pursue the claim *ab initio* in federal court. Here, if Graham prevails in this Court, the threshold question for review on remand to the Fifth Circuit will be whether he is entitled to pursue his successive petition under the pre-AEDPA standard of *McCleskey v. Zant*, 499 U.S. at 493-95. That standard will require Graham to show that the constitutional violation in his case (ineffective assistance of counsel) led to the conviction of one who was probably innocent.

If the ruling below is allowed to stand, Graham -- who asserts that he was erroneously convicted because of his trial counsel's incompetent performance -- will be executed without any definitive federal resolution of those claims. Congress could perhaps mandate that result, but this Court has already held that it

did not. Several of the *amici* suffered years of unjust imprisonment because of their trial counsel's ineffectiveness. They know first-hand the almost insuperable practical obstacles to amassing sufficient resources to meet even this Court's *McCleskey* standard.[3] Together with the other *amici*, they urge the Court to enforce its ruling in *Martinez-Villareal* here, so as to uphold the protections the Court it has carefully crafted for those in their position.

B. Having Found No Plain Statement that Congress Intended AEDPA to Apply, the Fifth Circuit Erred in Applying AEDPA.

Having wrongly decided that AEDPA governed this case, the court below proceeded to examine whether Congress intended the statute to apply retroactively to situations like the one presented. It found nothing specific on point. As the Petition argues (Pet. at 22-23), this should have led the Fifth Circuit to

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[3]In all too many cases, the vindication of innocence has occurred only because Death Row inmates have been the fortunate beneficiaries of pro bono generosity. See *People v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., concurring and dissenting) (reviewing cases of nine wrongly convicted capital inmates in Illinois: "If these men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release."). Thus, for example, Randall Dale Adams was freed in Texas in 1989 as the result of the efforts of a documentary filmmaker; the vindication of Willie A. Brown in Florida in 1988 followed a re-investigation of his case by a prison activist who spent $70,000 of her own money on the cause; Sonia Jacobs was released from Death Row in Florida in 1992 because a childhood friend found out about the case and led an investigation after hearing of the execution of her co-defendant; and Verneal Jimerson and Dennis Williams were vindicated in Illinois as the result of the investigative efforts of journalism students supervised by Professor David Protess of Northwestern University. See Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 923, 930, 941, 944 (1996).

apply the plain statement rule of *Landgraf*, 511 U.S. at 280, and interpret the statute as inapplicable. See *Martin v. Michigan Dep't of Corrections*, 119 S.Ct. 1998, 2003 (1999).

Instead, the Court of Appeals hypothesized that Congress would have wanted AEDPA to apply to cut off Graham's claims because of its general intention to prevent delays. See *Graham v. Johnson*, 168 F. 3d 762, 779-89 (5th Cir. 1999). Quite apart from the fact that the plain-statement rule is designed exactly to prevent this sort of unguided speculation (*Martin*, 119 S.Ct. at 2005-06), the speculation itself is unconvincing.

Legally, it is a general rule of statutory construction that Congress is presumed to know and approve of existing decisional law unless it specifically states otherwise. See *Lorillard v. Pons*, 434 U.S. 575, 581-83 (1978). Prior to the enactment of AEDPA, the Circuits were uniform in not treating petitions filed under such circumstances as successive. See, *e.g.*, *Aiken v. Blodgett*, 921 F.2d 214 (9th Cir. 1990), cert. denied, 502 U.S. 839 (1992); *Grant v. Hoke*, 921 F.2d 28, 29 (2d Cir. 1990); *Mathis v. Zant*, 903 F.2d 1368 (11th Cir. 1990). Thus, quite apart from the *Landgraf* issue, the Fifth Circuit's reading of the statute is at odds with the ordinary presumptions concerning legislative intent.

Amici urge that, in the present circumstances, it makes sound practical sense to apply those presumptions, and to read Congressional silence as protecting, not destroying, pre-existing legal rights. If Congress had focused on the transitional problems that would be created by applying the successive-claim provisions of AEDPA to those in Graham's position, it almost surely would have explicitly made the new provisions inapplicable to those litigants, for precisely the reasons we urge here. Such people had necessarily arrived in federal court under a legal regime in which their rights to file successor petitions were governed by the miscarriage of justice rule of *McCleskey*, and it would be unfair to deprive them of an entitlement woven into the fabric of the prior

law. No matter how strongly Congress wanted to expedite executions when it enacted AEDPA, it is clear that it never intended to significantly enhance the risk of executing potentially innocent defendants who have never had a meaningful opportunity to have their effectively presented claim adjudicated in federal court.

C. Applying the Test of "Common Sense," the Fifth Circuit Should Have Rejected as Impermissibly Retroactive a Reading of AEDPA that Would Retrospectively Deprive Arguably Innocent Death Row Prisoners of the Right to Attack Counsel's Failure to Find the Evidence of Innocence.

After wrongly setting aside the rules of statutory construction mandated by this Court's cases, the Fifth Circuit decided that the application of AEDPA's new substantive standards respecting successor petitions[4] would not have an impermissible retroactive effect. As the Court of Appeals noted, this is ultimately a matter of judgment. See *Martin*, 119 S.Ct. at 2006 (inquiry "demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment,'" quoting *Landgraf*, 511 U.S. at 270). We urge this Court to apply its judgment to the matter, with a view towards vindicating the views of the several Circuits that disagree with the Fifth.

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[4]As applicable to this case, those standards are the ones contained in 28 U.S.C. § 2244 (b) (1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed") and § 2244 (B)(i) (a claim not previously presented shall be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.").

The reason is straightforward. As already indicated, Graham had a right to obtain a ruling on the merits of his constitutional claim solely upon a showing of a colorable claim of innocence -- a showing that the District Court assumed in 1993 he had succeeded in making. If AEDPA applies, then Graham will no longer be able to attack trial counsel's conduct in failing to collect and present the available evidence of innocence. That would surely (and probably fatally) deprive Graham of his right to be heard on the merits, a pre-existing legal right of considerable value -- as this case demonstrates, and as *amici* are most keenly aware.

But the Fifth Circuit held that reading AEDPA as requiring this result would not render it impermissibly retroactive because Graham could only succeed if he were able to demonstrate that he relied upon the prior law.[5] Because Graham had never had the right to file an unexhausted petition, the Court of Appeals said, he could not reasonably expect that he would later be entitled to the benefits of the law as it existed at the time of that improper filing. *Graham v. Johnson*, 168 F.3d at 786.

This reasoning is badly flawed. To begin with, it unfairly assumes the conclusion -- after all, the Circuit Court in 1996 dismissed the petition *sua sponte*. The court never gave Graham a chance to argue his entirely reasonable position that he had indeed sufficiently exhausted his state remedies (Question 3(B)). Then, in 1999, that same court arbitrarily refused to address the problem it had created (Questions 4-5).

Moreover, leaving to Graham's counsel the argument that the creation of a formalistic and inflexible "reasonable reliance" requirement is inconsistent with this Court's precedents (Question

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[5]*Martin* makes clear that such reliance is one factor to be taken into account. The question is whether the Fifth Circuit was correct in making it the determinative factor in the "common sense, functional judgment" it was supposed to be reaching.

3(A)), we wish to emphasize the practical realities of the situation facing innocent Death Row prisoners. There is good reason why outside the Fifth Circuit a petitioner need show no more than that a claim that he would otherwise be allowed to pursue will be dismissed.

The right to litigate defaulted legal claims on a colorable showing of actual innocence was part-and-parcel of -- and to some extent an amelioration of -- a system in which the quality of counsel available to capital defendants and death-sentenced inmates was at times inadequate. Counsel was all too often deficient in satisfying the expectation of *Powell v. Alabama*, 287 U.S. at 69, that legal representation would enable the innocent to escape mistaken convictions and death sentences.[6]

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[6]Arguably, the system has changed for the better in the past few years. First, this Court in *McFarland v. Scott*, 512 U.S. 849 (1994), reinvigorated 21 U.S.C. § 848, the statutory provision for appointment of federal habeas counsel in capital cases. By allowing the appointment of counsel upon the filing of a request for one (rather than on the filing of a formal habeas corpus petition) the ruling served to give capital defendants competent, compensated counsel to investigate their cases much earlier than had previously been the case. Then, in conjunction with its consideration of AEDPA, Congress turned back a proposal to weaken the provision. See Larry W. Yackle, *A Primer on the New Habeas Statute*, 44 BUFF. L. REV. 381, 393 n.42 (1996) ("The original bill in the Senate would have repealed the *right* to counsel in capital habeas cases .... On the floor however, Senator Biden persuaded Senator Hatch to accept an amendment that preserves the mandatory character of the counsel statute in death penalty cases. The new statute, then, leaves the right-to-counsel aspects of *McFarland v. Scott* ... intact.").

The new statutory restrictions contained in AEDPA thus exist within a legal environment significantly different from the one that existed at the time Graham and the *amici* were attempting to establish their innocence.

Such practitioners did not take or omit certain steps in reliance on existing law -- in far too many cases, they were utterly ignorant of the existing law.[7] Yet, under the ruling below, inmates who suffered from the very worst representation (precisely the ones the miscarriage of justice doctrine was designed to assist) are denied adjudication of their claims. According to the Fifth Circuit, these inmates are even barred from raising their claims of ineffective assistance of trial counsel -- because counsel's legal theories were "patently unreasonable," *Graham v. Johnson*, 168 F.3d at 787. In other words, some inmates who did not commit murder are to be executed instead for the crime of having been saddled with lawyers so ignorant that they managed to block even the safety valve this Court created to protect against that consequence. This is a perversion not just of law, but of justice.

D. To Prevent a Miscarriage of Justice the Fifth Circuit Should Have Recalled its 1996 Mandate.

Under the circumstances, the very least that the Fifth Circuit should have done was to recall the mandate it issued *sua sponte* in 1996 -- the unanticipated source of the legal barriers that have now arisen to prevent a capital prisoner from demonstrating his innocence. But the Fifth Circuit refused.

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[7]See, *e.g.*, *The Crisis in Capital Representation*, 51 REC. ASSOC. B. CITY N.Y. 169 (1996); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Stephen S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (ABA report on reforming the capital litigation system).

The Court of Appeals placed literalistic reliance on fact-specific language in *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489 (1998), distinguishing between *sua sponte* recalls of mandates and those following the request of a party. At the sanme time, the Court of Appeals conspicuously ign ed Graham's argument based on the proposition unanimously endorsed by the *Calderon* Court: a Court of Appeals behaves properly in recalling its mandate when "it acts to avoid a miscarriage of justice as defined in our habeas corpus jurisprudence." *Calderon*, 118 S.Ct. at 1502.

Of course, that is precisely what is at issue here. A "miscarriage of justice" occurs when "a constitutional violation," such as ineffective assistance of counsel, "has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. at 496; accord *Schlup*, 513 U.S. at 326. The Fifth Circuit's summary refusal to even consider this issue was a legal error that, undermining the type of safeguards from which *amici* benefited, threatens to subject Graham to the ultimate miscarriage of justice.

Assuming that every other portion of the Fifth Circuit's decision was correct, it is all the more important for the Court to reverse this aspect of the ruling. For if the Courts of Appeals no longer retain discretion to hear gateway innocence claims (see *id.* at 315 n.30), by employing their "recognized ... inherent power to recall their mandates" (*Calderon*, 118 S.Ct. at 1498), then the "gateway" is illusory.

We who owe our lives to the contrary principle urge the Court to reaffirm its oft-repeated admonition that it will administer the federal habeas corpus regime in such a way as to implement "the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982). See also *Murray v. Carrier*, 477 U.S. at 495; *Schlup*, 513 U.S. at 320-21.

Unfortunately, it can take years for the evidence of a condemned inmate's innocence to come to light. In the case of Kirk Bloodsworth, for example, it was nine years after conviction that he was set free. Similarly, Clarence Lee Brandley worked to prove his innocence for eight years. Joseph Green Brown was in prison for 13 years before he was freed on federal habeas corpus. And Walter McMillian spent five years behind bars before he was exonerated. These histories, together with the histories of at least 77 other innocent men and women who have been wrongly condemned to die only to be later exonerated, confirm that the unthinkable can happen. Mistakes are inevitable in any human endeavor and the true measure of a legal system's justness is the extent to which it is committed to providing reasonable mechanisms for correcting those tragic errors. If the pain the individual *amici* have suffered — being locked up for years and condemned to die for crimes we did not commit – can help this Court recognize the critical need for providing such mechanisms to others, then at least their suffering will not have been completely in vain.

CONCLUSION

Understood in the context of a death penalty system still inching painfully toward reform, the ruling below is legally wrong and structurally counter-productive. It places one of the largest death penalty Circuits well outside the mainstream of the sound principles adopted elsewhere in the country, and is profoundly unfair to prisoners facing wrongful execution. As individuals who were once in that position ourselves, but had the good fortune to have the law applied fairly in our cases, *amici* urge this Court in the name of justice to grant the petition for certiorari in this case and reverse the decision below.

Respectfully submitted,

ERIC M. FREEDMAN
(Counsel of Record)
Hempstead, New York 11550
(516) 463-5167

LAWRENCE C. MARSHALL
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

No. 98-10002

GARY GRAHAM, now known as
SHAKA SANKOFA,

Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

REPLY TO BRIEF IN OPPOSITION

Petition For Writ of Certiorari to The
United States Court of Appeals For The Fifth Circuit

RICHARD H. BURR*
1630 Castle Court, Ste. A
Houston, Texas 77006
(713) 523-2299
(713) 523-3833 (fax)

JACK B. ZIMMERMANN
770 South Post Oak Lane, Ste. 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

*Counsel of Record

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In its effort to persuade the Court that the issues presented by Mr. Sankofa in his petition for writ of certiorari are not worthy of the Court's consideration, Respondent's brief in opposition makes the reasons for granting certiorari even stronger. As much from what the Attorney General does not argue as from what he does argue, the brief in opposition should strengthen the Court's resolve to give plenary review to the questions presented by Mr. Sankofa.

1. The Attorney General conspicuously tries to downplay the fundamental miscarriage of justice that will occur if Mr. Sankofa is executed without a full and fair inquiry into the merits of his claims.

There is no hint of concern in the brief in opposition that a person innocent of murder may be on the brink of execution without having had any merits inquiry into the ineffective assistance provided by his trial counsel and the startling quantity of crime scene evidence that points to his innocence. Knowing that others have this concern after reviewing the facts of Mr. Sankofa's case, however, the Attorney General takes four steps to try to allay the legitimate concerns raised by Mr. Sankofa's case. None of these efforts can allay these concerns.

The Attorney General's first effort is to provide ten pages' worth of detail in his statement of facts about the evidence of aggravated assaults and robberies committed by Mr. Sankofa that was introduced in the penalty phase of Mr. Sankofa's trial. There is only one reason to have done this: to try to color the Court's perception on the wholly unrelated issues presented in the petition for writ of certiorari. That Mr. Sankofa committed and pled guilty to a string of other violent crimes committed <u>after</u> the shooting of Bobby Lambert – none of which was a homicide and none of which was committed in the same manner or in circumstances similar to the murder of Mr. Lambert – does not have any bearing on whether Mr. Sankofa committed, and was properly convicted of committing, the murder of Mr. Lambert. There is no

issue in the petition for writ of certiorari that depends in any way upon these facts. In the recent appeal to the Fifth Circuit, the same issues were before that court that are now before this Court. The only reference made by the Fifth Circuit to the evidence of other crimes was the following:

> During the punishment phase, the state demonstrated that from May 14 to May 20, 1981, Graham robbed some thirteen different victims in nine different locations, in each instance leveling either a pistol or a sawed- off shotgun at the victim. Two of the victims were pistol-whipped, one was also shot in the neck, an elderly man was struck with the vehicle Graham had stolen from him, and a fifty-seven-year-old woman was kidnapped and raped.

Graham v. Johnson, 168 F.3d 762, 765 n.3 (5th Cir. 1999). This is the kind of reference that is properly made to evidence that is a part of the case but that has no bearing upon the issues presented. By contrast, the Attorney General's presenting ten pages' worth of detail about these crimes – as much space as is devoted to the entire argument against granting certiorari – is a transparent attempt to bias the Court against Mr. Sankofa and to distract the Court from the gravity of the issues presented. Mr. Sankofa is paying the price for committing the non-capital crimes. He should not be required to pay with his life for a murder he did not commit.

The second effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that the Texas Court of Criminal Appeals made "presumptively correct" "implied and express factual findings" when it determined that Mr. Sankofa failed in his 1998 state habeas application "to satisfy the threshold showing of innocence required to file a successive state habeas application...." Respondent's Brief in Opposition, at 25 n.12. While this is not the stage of the proceedings and this is not the court to determine whether any deference should be given to the state court's factfindings, the Attorney General's assertion is misleading and should be understood as such.

In assessing whether the claims alleged in a successive habeas application under state law

should be considered on the merits, the Texas Court of Criminal Appeals must determine whether "by a preponderance of evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(2). To do this, the court must presume the evidence supporting innocence to be true — "an applicant ... must ... demonstrate that the newly discovered evidence, if true, creates doubt [about guilt]," *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 398 (Tex.Crim.App. 1994) — and then measure it against the evidence at trial. Thus, the Court of Criminal Appeals' determination that the evidence of Mr. Sankofa's innocence was insufficient to require consideration of the claim on the merits is clearly **not** a finding, as the Attorney General suggests here, that the allegations of fact proffered in support of the claim were somehow insufficient to establish innocence. It is no more than a legal conclusion that the facts do not meet Texas' much higher standard for gauging innocence than the federal standard.[1] A state court's legal conclusion applying a different innocence standard is not binding in any way in a federal habeas proceeding.

The third effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that the federal district court in 1993 "rejected Graham's claim of innocence," citing *Graham v. Collins*, 829 F.Supp. 204, 207 (S.D.Tex. 1993). Respondent's Brief in Opposition, at 25 n.12. The Attorney General's assertion is, again, misleading. In the 1993 petition, Mr. Sankofa made two different kinds of claims of innocence. The first was a claim of innocence associated with a claim of ineffective assistance of counsel, which was made

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[1]The federal standard under the AEDPA is a "clear and convincing evidence" standard, 28 U.S.C. 2244(b)(2)(B)(ii), and under the Court's pre-AEDPA cases is a "probably," *i.e.*, more likely than not, standard. *Schlup v. Delo*, 513 U.S. 298, 322 (1995); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). The state "no rational juror could have found" standard is the equivalent of the beyond a reasonable doubt standard.

in order to satisfy the then-existing threshold for presenting a substantive claim in a successive habeas petition. The second was a claim that because Mr. Sankofa was innocent the Eighth Amendment prevented his execution. In *Schlup v. Delo*, the Court explained that the first kind of innocence claim is "procedural" and the second is "substantive," 513 U.S. at 314, and that the standard of proof is much higher for a substantive claim of innocence. *Id.* at 314-316. In Mr. Sankofa's 1993 federal habeas proceeding, the district court did reject his substantive claim of innocence, as the Attorney General correctly recites in footnote 12 of his brief in opposition. However, this is not the claim of innocence that is operative in the present habeas proceeding. Rather, it is Mr. Sankofa's procedural claim of innocence that is at issue in the present proceeding. As to this claim of innocence, the district court assumed in 1993 that the allegations in the petition, if credited, would satisfy the procedural test of innocence.[2]

The final effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that Mr. Sankofa's interest in vindicating his innocence is adequately protected by Texas' clemency process. *See* Respondent's Brief in Opposition, at 28 (citing the case of Henry Lee Lucas, "who obtained executive clemency on claims of actual innocence through the same avenue available to Graham"). Such a suggestion urges the Court to

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[2]The district court explained, in reference to only a portion of the evidence of innocence,

> The affidavits of Sherian Etuk, Ronald Hubbard, Mervyn West, and Wilma Amos Antwine, if credited, would satisfy the *Kuhlmann* [*v. Wilson*, 477 U.S. 436, 452-454 (1986)] test. The state court has determined that two of these affidavits are not credible. Rather than defer to the state court's factual findings at this stage of the inquiry, the Court will assume arguendo that the evidence Graham has presented makes out a colorable showing of factual innocence.

829 F.Supp. at 208.

find solace in a procedure that a federal district court recently determined to be "extremely poor and certainly minimal." *Faulder et al. v. Texas Board of Pardons and Paroles*, Order, Nos. A-98-CA-801-SS, A-98-CA-803-SS, United States District Court for the Western District of Texas, December 28, 1998 (unpublished) [hereafter, "Order"]. In rejecting the claim of the petitioners in *Faulder* that the Texas Board of Pardons and Paroles' clemency procedure violates the "minimal" due process guarantees required of a capital clemency process, the district court nevertheless found that the clemency process in Texas is woefully inadequate. In sum, the court found that

> all pertinent information is not given to all Board members before they vote, and some information is inadvertently never provided to the Board members.... Members are provided with an opportunity to recast their votes in light of subsequent filings, but they are not required to re-attest that they have reviewed the entire petition. It is apparent that none of the members read every word on every line of every piece of paper in the clemency application.

Order, at 14-15.

> [The Board Chairman], obviously frustrated and angered by the petitioner's challenge to his process, testified adamantly that the Board has the power to call hearings, conduct investigations, interview petitioners, and request testimony. However, [he] concedes that the Board has not conducted any such activities since he began his tenure as Chair in 1995. This is remarkable, especially considering the facts that the Board has reviewed fifty-seven [capital clemency] petitions during the tenure of Rodriguez as Chair of the Board.[3]
>
> Only once has the Board recommended clemency to a death-row inmate. On June 26, 1998, Governor George W. Bush, in accordance with a recommendation by the Board of Pardons and

[3] Paul Prejean, who has been a member since 1993, testified no board member has ever requested a hearing or teleconference on any of the seventy-six clemency petition considered during his tenure. He has never voted in favor of a recommendation of clemency.

> Paroles, commuted the death sentence of Henry Lee Lucas to life imprisonment.[4]

Order, at 12 (footnotes in original).

With respect to claims of innocence as grounds for clemency, the district court found that

> [t]he [Board] members consistently testified that they considered a petitioner's guilt or innocence, but no member could specify with any particularity what he or she would look for to determine a recommendation for clemency.

Order, at 14 n.10.

The Board of Pardons and Paroles in April, 1993, denied Mr. Sankofa's request for clemency based upon innocence. *See State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 391 (Tex.Crim.App. 1994). Given Board's "extremely poor and certainly minimal procedure," *Faulder, supra*, and that in the only clemency application ever granted – which happened to be based on the applicant's innocence – the Attorney General and law enforcement joined the request for clemency, the Court should not avoid plenary review of Mr. Sankofa's case in reliance on the "failsafe" of clemency. That failsafe does not exist in Texas and has already failed Mr. Sankofa.

2. The Attorney General fails to acknowledge that the principles underlying *Stewart v. Martinez-Villareal* and *Calderon v. Thompson* reasonably called for the Fifth Circuit (a) to treat the 1998 petition as the 1993, pre-AEDPA petition, or (b) to recall and amend its mandate in the appeal of the denial of the 1993 petition to see that Mr. Sankofa received the merits hearing that the court had found in 1996 he was entitled to -- thereby avoiding application of the AEDPA to Mr. Sankofa.

There is no acknowledgment by the Attorney General that in light of the Fifth Circuit's

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[4] There was, of course, no evidence as to why this recommendation was made by the Board, but it is beyond dispute this action was requested by the Attorney General, law enforcement officials, as well as those representing the judicial system.

determination in 1996 that Mr. Sankofa's troubling claims warranted further factual inquiry on the merits, the Fifth Circuit may have been mistaken in 1999 when – even though no merits inquiry had yet occurred – it determined that the AEDPA had to be applied to Mr. Sankofa's case to preclude the very merits hearing that it had held was warranted. Even if the Attorney General disagrees that the principles underlying *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), required the Fifth Circuit to treat the 1998 petition as the 1993 petition, he cannot reasonably disagree that *Martinez-Villareal* can be read to support this outcome – yet he does. Further, even if the Attorney General disagrees that the principles underlying *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489 (1998), required the Fifth Circuit to grant Mr. Sankofa's motion to recall its mandate in the appeal of the 1993 case, he cannot reasonably disagree that *Thompson* and the equitable principles underlying it can be read to support this out come – yet he does. In these respects, the Attorney General's position is indefensible.

As set forth in the petition for writ of certiorari, Mr. Sankofa has argued that the rationale of *Martinez-Villareal* called for the Fifth Circuit to treat Mr. Sankofa's 1998 petition as his 1993 petition for purposes of whether the AEDPA would be applied to the petition. The reason for this is that *Martinez-Villareal* treats the re-filing of a petition presenting a claim that had previously been dismissed without prejudice and not on the merits, as premature, as the equivalent of re-filing a petition presenting claims that had previously been dismissed for lack of exhaustion. 118 S.Ct. at 1622. In this context, the Court explained that the subsequent petition was not a separate application, but in reality the same application as the one dismissed without prejudice:

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but **this does not mean that there were two separate applications**, the second of

> which was necessarily subject to § 2244(b). **There was only one application for habeas relief**, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

118 S.Ct. at 1621 (emphasis supplied).

The Attorney General argues that the rationale of *Martinez-Villareal* is useful only in determining whether the subsequent petition is to be treated as successive under the rules governing successive petitions. Since Mr. Sankofa's 1993 petition was clearly a successive petition, the argument goes, *Martinez-Villareal* has nothing to do with determining whether his 1998 petition should be treated under the successive petition rules.

This argument misses the point made in the petition, for as we argue there, if under *Martinez-Villareal* the 1998 petition should be treated as the 1993 petition, the petition would still be successive because the 1993 petition was successive, but the law governing the petition should be pre-AEDPA law. Since *Martinez-Villareal* reasonably supports this position, it is plainly important enough to the nation's jurisprudence for the Court to consider whether the Fifth Circuit erred in holding that it does not.

Similarly, the Attorney General's cramped reading of *Calderon v. Thompson* is indefensible. Reading *Thompson*'s warning that "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision ... is subject to AEDPA," 118 S.Ct. at 1500, as subjecting any prisoner-initiated motion to the AEDPA ignores the very reason *Thompson*'s directive does not apply in Mr. Sankofa's case. As we noted in the petition, Mr. Sankofa's motion to recall the mandate was not a request to reconsider in any manner the "merits of the underlying decision." Rather, it was a request that the Fifth Circuit recall the mandate in order to give effect to the merits of the underlying decision. The concern underlying *Thompson* was that

motions to recall mandates not be used to avoid the application of AEDPA to claims that are new, post-AEDPA claims or pre-AEDPA claims reinvigorated by post-AEDPA-discovered evidence. Mr. Sankofa's motion sought neither of these ends. He sought only to avoid the fundamental miscarriage of justice in his case of having the merits hearing ordained by the Fifth Circuit snatched away by the unforeseen consequences of dismissal for further exhaustion. It is reasonable to read *Thompson* as supporting Mr. Sankofa's motion rather than defeating it. Accordingly, it is plainly important enough to the nation's jurisprudence for the Court to consider whether the Fifth Circuit erred in giving the same cramped reading to *Thompson* that the Texas Attorney General gives it.

3. If that portion of the AEDPA providing a statute of limitations were applicable to Mr. Sankofa's case, no issue respecting its application can properly be considered by the Court because the lower courts did not address any such issue.

If Mr. Sankofa's 1998 habeas petition is treated as a new petition subject to the AEDPA rather than as the continuation of the 1993 pre-AEDPA petition, the applicability of various AEDPA provisions to the 1998 petition must be considered. In this regard, the petition presents two questions concerning the impermissible retroactive effect of AEDPA's successive petition provisions. To his credit, the Texas Attorney General makes no serious argument that application of AEDPA's successive petition provisions to Mr. Sankofa's case does not have an impermissible retroactive effect, or that this issue is not worthy of the Court's review. However, to the Attorney General, the retroactive effect of AEDPA's successive petition provisions is inconsequential because in his view AEDPA's statute of limitations, in any event, bars consideration of Mr. Sankofa's claims. On this basis, he urges the Court to deny review of the concededly cert-worthy questions concerning the retroactive effect of AEDPA's successive petition provisions.

The flaw in the Attorney General's argument is that the applicability of the statute of limitations to successive petitions and, if applicable, the equities of applying the statute of limitations to bar Mr. Sankofa's 1998 petition, are issues hotly disputed by Mr. Sankofa and wholly unresolved by the lower courts in his case. In both the district court and the Fifth Circuit, the Attorney General made the same statute of limitations argument he makes here. The district court did not mention, much less address, this argument. *See Graham v. Johnson*, 45 F.Supp.2d 555 (S.D.Tex. 1999) (Appendix 2 to Petition for Writ of Certiorari). The Fifth Circuit mentioned the argument but explicitly did not address it:

> The state urged both in its briefs and in oral argument that we should deny Graham's Motion for Order Authorizing District Court to Consider Successive Habeas Petition because his current application is time-barred under 28 U.S.C. § 2244(d). We need not reach the limitations question, however, because Graham concedes, see infra Section III.C, that he cannot meet the requirements for the issuance of such an order [because of the successive petition provisions]. We express no opinion as to whether a court of appeals should consider the timeliness of a habeas application in deciding a prisoner's motion for authorization to file it.

Graham v. Johnson, 168 F.3d 762,787 n.20 (5th Cir. 1999) (Appendix 1 to Petition for Writ of Certiorari).

Counsel for Mr. Sankofa argued extensively in the briefing before the Fifth Circuit, *see* Reply Brief of Petitioner/Petitioner-Appellant, at 37-42, that AEDPA's statute of limitations did not apply to a federal habeas petitioner whose successive federal petition was pending at the time AEDPA was enacted, whose case was subsequently dismissed without prejudice, and who thereafter returned to federal court with the very same claims that had been pending long before enactment of AEDPA. In the ensuing oral argument before the Fifth Circuit, counsel reiterated and expanded his argument that the statute of limitations could not, consistent with due process,

be applied to Mr. Sankofa.[5]

In these circumstances, the Attorney General's intoning AEDPA's statute of limitations and its simple mathematical bright line rule cannot and should not be a factor in the Court's decision whether to grant certiorari.

For these reasons, and for the reasons set out in the petition for writ of certiorari, we respectfully urge the Court to grant the petition.

Respectfully submitted,

Richard H. Burr/by express permission Lisa Greenman
RICHARD H. BURR*
1630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

Jack B. Zimmermann/by express permission Lisa Greenman
JACK B. ZIMMERMANN
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

*Counsel of Record

[5]Counsel also explained during oral argument that shortly after the 1996 decision by the Fifth Circuit dismissing Mr. Sankofa's federal petition for further exhaustion, Sankofa's only remaining attorney, Richard Burr, had to withdraw from further representation of Mr. Sankofa because of his appointment as counsel for Timothy McVeigh in the Oklahoma City bombing case pursuant to 18 U.S.C. § 3005. Because Texas does not provide a right to counsel for indigent successive state habeas applicants in advance of the filing of their habeas applications, Mr. Sankofa could not obtain substitute counsel and was unrepresented after Burr's withdrawal in the fall of 1996 and until Burr returned to Houston following the *McVeigh* trial. Mr. Sankofa, who is a high school dropout and has never attempted to develop self-representational skills, could not file a successive state habeas application on his own. Following his return to Houston, Mr. Burr represented Mr. Sankofa *pro bono* in the successive state habeas proceeding that was filed in April, 1998.

Certificate of Service

Certificate of Service

I hereby certify that I served a copy of the foregoing pleading on counsel of record for Respondent by depositing these documents with the United States Postal Service, first class postage prepaid, addressed to Assistant Attorney Tommy L. Skaggs, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, whose telephone number is (512) 936-1600, this 16th day of September 1999.

All parties required to be served have been served.

Richard H. Burr / by express permission
Lisa Greenman

RICHARD H. BURR
630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

Member of the Supreme Court Bar